No. 89-1715-CFX
Status: GRANTED

Title: Cathy Burns, Petitioner
v.
Rick Reed

Docketed:
May 7, 1990

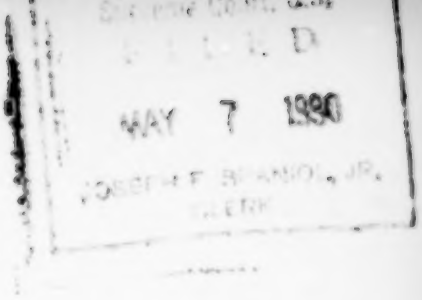
Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Sutherlin,Michael K.

Counsel for respondent: Nowak,David

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | May 7 1990 | G | Petition for writ of certiorari filed. |
| 2 | Jun 4 1990 | | Brief of respondent Rick Reed in opposition filed. |
| 3 | Jun 12 1990 | | DISTRIBUTED. June 27, 1990 |
| 4 | Jun 28 1990 | | Petition GRANTED. |
| | | | ********** |
| 5 | Jul 11 1990 | | Record filed. |
| | | * | Certified copy of C. A. Proceedings received. |
| 7 | Jul 30 1990 | | Order extending time to file brief of petitioner on the merits until August 20, 1990. |
| 8 | Aug 17 1990 | | Joint appendix filed. |
| 9 | Aug 17 1990 | | Brief of petitioner Burns, Cathy filed. |
| 10 | Aug 17 1990 | | Brief amici curiae of ACLU, et al. filed. |
| 11 | Aug 23 1990 | | Record filed. |
| | | * | Copy of docket sheet and certified record received from USDC S.D. of Indiana. |
| 12 | Sep 4 1990 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 14 | Sep 10 1990 | | Order extending time to file brief of respondent on the merits until September 24, 1990. |
| 15 | Sep 19 1990 | | Brief of respondent Rick Reed filed. |
| 16 | Sep 21 1990 | | Brief amicus curiae of California District Attorneys Association filed. |
| 17 | Sep 21 1990 | | Brief amici curiae of Wyoming, et al. filed. |
| 18 | Sep 24 1990 | | Brief amicus curiae of United States filed. |
| 19 | Sep 26 1990 | | CIRCULATED. |
| 20 | Oct 9 1990 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Souter OUT. |
| 21 | Oct 19 1990 | | SET FOR ARGUMENT WEDNESDAY, NOVEMBER 28, 1990. (3RD CASE) |
| 22 | Nov 28 1990 | | ARGUED. |

89-1715




No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**
October Term, 1989

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CATHY BURNS, *Petitioner,*

*v.*

RICK REED, *Respondent.*

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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May 7, 1990

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## QUESTIONS PRESENTED

I. Is a deputy prosecutor entitled to absolute immunity when he gives approval to conduct which is known or should be known to him to be improper, namely, the authorizing of the use of hypnosis on a suspect?

II. Is a deputy prosecutor entitled to absolute immunity when he seeks a search warrant in a probable cause hearing and intentionally fails to fully inform the court by failing to state that the arrested person made an alleged confession while under hypnosis and yet had persistently denied committing any crime before and after the hypnosis?

III. Is a deputy prosecutor entitled to absolute immunity when he participates in the unlawful arrest of an individual when under state law the prosecutor possesses the same arrest powers as police officers?

IV. Are such activities individually and collectively outside the protected activities of initiating a prosecution and presenting the State's case?

[Note: Petitioner reserves the right to argue Question 5 in the event certiorari is granted on the above questions, but does not include Question 5 among the reasons for the grant of certiorari.]

V. Is it a question of fact for the jury to decide whether an activity is investigative when the veracity of the witnesses and the conflict in the testimony do not define the issue of immunity purely as a matter of law?

## LIST OF PARTIES

The parties to the proceedings below were the petitioner Cathy Burns and the respondent Rick Reed, Deputy District Attorney for Delaware County in Indiana.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

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CATHY BURNS, *Petitioner,*

*v.*

RICK REED, *Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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The petitioner Cathy Burns respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on February 6, 1990.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 894 F.2d 949 and is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the United States District Court for the Southern District of Indiana (Dillin, D.J.) has not been reported. It has been transcribed and reprinted in the appendix hereto, p. 15a, *infra*.

## JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the Southern District of Indiana. Petitioner proceeded to trial and on November 4, 1988 the Southern District granted respondent's motion for a directed verdict.

On petitioner's appeal, the Seventh Circuit affirmed the District Court's order directing a verdict in favor of the

respondent on February 6, 1990. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of 42 U.S.C. § 1983 and Indiana Code provisions 33-14-1-3 (1971), 35-33-1-1 (1971), and 35-41-1-17 (1971) are reproduced verbatim in the appendix, p. 19a, *infra*.

## STATEMENT OF THE CASE

This case was initiated by Cathy Burns on January 31, 1985, by the filing of a complaint in the United States District Court for the Southern District of Indiana against Rick Reed, the deputy prosecutor for Delaware County, Indiana.[1] Burns sought actual and punitive damages against Reed for a violation of her constitutional rights as Reed acted under color of state law. The district court had jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1343 (a)(3) and (4), as the suit was brought under 42 U.S.C. § 1983 to redress the deprivation of Burns's constitutional rights.

On the evening of September 2, 1982, an unknown person entered the home of Cathy (Sells) Burns[2], petitioner, located in Muncie, Indiana. The intruder shot the two children of Burns and attacked her with a blunt instrument. Burns was a reserve police officer working as a civilian radio dispatcher, and was able to fire one shot from her service revolver before the intruder overpowered her. She was awakened by one of her children and after assessing the injuries to both of them called the police

[1] The original complaint named ten defendants. The claims against defendants Muncie Police Department and several other individuals were dismissed by the trial court. The case continued against defendants Scroggins, Cox, and Stonebraker, who were investigating officers in the Muncie Police Department, and Rick Reed, deputy prosecutor for Delaware County, Indiana. Scroggins, Cox, and Stonebraker settled with Burns for sums of money totalling $250,001.00. The case against Reed continued to trial.

[2] Ms. Burns changed her surname from Sells to Burns when she married.



dispatcher. A message was scrawled on a mirror in the home with lipstick: "I took what you loved most." All three received medical treatment including emergency surgery at Methodist Hospital in Indianapolis, Indiana.

Two Muncie police officers, Cox and Scroggins, formed the opinion that Burns was a prime suspect in the shooting. Although there was no admissible or reliable evidence to establish probable cause, the officers remained focused on Burns. Burns took a voice stress test which revealed Burns was truthful in denying any involvement in the crime. Officer Cox believed Burns may have committed the crime but might be unable to reveal the facts because of some mental block.

It was at this time that the testimony of Officers Cox and Scroggins differs significantly from the testimony of deputy prosecutor Reed, defendant in the lower court. The police officers insisted that Reed was contacted before Burns was placed under hypnosis and that when his advice was sought, he authorized them to proceed with the hypnosis, despite being informed by Officer Scroggins that it was his belief that this hypnosis may be violating the law and that he knew from his training that it was improper to hypnotize a suspect. Reed, in his testimony, recalled no such conversation and testified only that he was contacted at home sometime after 5:00 p.m. the evening Burns was placed under hypnosis, September 21, 1981.

Cox and Scroggins videotaped the hypnosis but omitted recording the preliminary preparation. Under hypnosis Burns made statements which Cox and Scroggins interpreted as evincing a multiple personality. The videotape of the hypnosis shows that there was a post-hypnotic suggestion made by Officer Cox that Burns would not remember the hypnosis but would cooperate fully with the police in their investigation of the crime.

The record reflects that Reed came down in the evening to the office of Detective Cox and, according to the testimony of Cox and Scroggins, viewed the videotape of Burns while she was under hypnosis. Officer Cox offered his belief that Burns was a multiple personality and that her "alter-ego" was responsible for the crime. Reed, in his testimony, did not recall viewing the videotape. According to the testimony of Officers Cox and Scroggins, they obtained permission from Reed to arrest Burns. According to Officer Cox, there was a meeting in which it was decided that they would not reveal to the public that Burns had

been hypnotized or what their source of information was regarding various matters of evidence.

The following day, Officers Scroggins and deputy prosecutor Reed sought a search warrant from the Honorable Judge Betty Cole. At the hearing for the search warrant, the magistrate was told of Burns's "confession" but was not told that it was obtained while Burns was under hypnosis. The magistrate was also not told of the two stated claims of innocence made by Burns. Judge Cole issued the search warrant while totally unaware of the basis of the information presented by Reed.

Eight days after Burns was arrested and six days after the search warrant was obtained, Jack L. Stonebraker, police liaison with the Delaware County Prosecuting Attorney's Office, submitted an affidavit to Judge Cole in support of probable cause to issue an arrest warrant. Again, the information presented did not inform the court that the interrogation of Burns occurred while she was under hypnosis. Judge Cole issued the arrest warrant.

The State filed a charge of attempted murder against Cathy Burns. Various psychiatrists and psychologists examined Burns and each and every one found she was not a multiple personality. They found her to be a reasonably normal individual in fear of losing her children through pending child custody hearings and to be potentially suicidal because of her situation. The State's charge was challenged by a motion to quash the statements made by Burns while under hypnosis. Following the court's ruling, the prosecutor's office moved to dismiss the case against Burns and she was released.

Because of media attention and damaging statements made by the police and Reed, as well as remarks made by the fathers of the minor children, the civil court felt it was in the best interest of the children that they not be returned to their mother. The oldest child was allowed to return to live with Burns in 1986, but the younger child was not permitted to live with Burns by his father, nor was Burns permitted regular visitation as of 1988 by order of the court having jurisdiction over the custody question.

Following Burns's release, she attempted to regain her employment with the Muncie Police Department but was unable to do so because of accusations made during the employment hearing and in public by various police officers and deputy prosecutor Reed, who even gave a public interview indicating he



still considered her the primary suspect. His publicly defaming statements interfered with her ability to gain employment and continued to provide a basis for the fathers of the minor children to resist any type of contact that Cathy Burns wanted to have with her own children.

Burns sought psychiatric assistance from various professionals. One psychiatrist and another psychologist identified Burns's condition as the equivalent of Post Traumatic Stress Syndrome and presented evidence at trial of the impact and consequences of such a condition to her and her family.

The case went to trial before the district court and the court entered judgment for the defendant Reed on his motion for a directed verdict made at the conclusion of Burns's case-in-chief. Burns appealed to the United States Court of Appeals for the Seventh Circuit. That court, in an opinion by Chief Judge Bauer joined by Circuit Judges Cummings and Ripple, affirmed the trial court's decision, holding that the doctrine of absolute immunity barred Burns's claim against deputy prosecutor Reed.

## REASONS FOR GRANTING THE WRIT

### I

**The Seventh Circuit's decision in *Burns v. Reed* extends the doctrine of absolute prosecutorial immunity beyond the limits this Court set forth in its decision in *Imbler v. Pachtman* and conflicts with decisions of other Circuits.**

The Seventh Circuit has, without the authorization of precedent from this Court, extended the doctrine of prosecutorial immunity to include investigatory activity. The extension of this Court's holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976) creates a genuine threat to the rights and liberties guaranteed by the United States Constitution and therefore deserves this Court's attention.

This Court in *Imbler* held explicitly that a prosecutor enjoys absolute immunity from suit under 42 U.S.C. § 1983 when the prosecutor acts toward "initiating a prosecution and in presenting the state's case." 424 U.S. at 431. This Court noted that the duties of a prosecutor involve actions beyond the initiation of a prosecution and the presentation of the state's case,

and indicated that in some of these activities the prosecutor functions as an administrator rather than as an officer of the court. The case presented in *Imbler*, however, did not require this Court to address these other issues. *Id.* at 431, n. 33.

The Seventh Circuit's decision presents this Court with the opportunity to decide these other issues, and the unwarranted extension of the *Imbler* holding and the threat it creates to constitutional liberties justifies this Court's hearing this case.

The activities Deputy Prosecutor Reed engaged in do not fall within the categories of initiating a prosecution or presenting the state's case. This Court has held that absolute prosecutorial immunity extends no further than necessary to protect those activities intimately associated with initiating a prosecution and presenting the state's case. *See Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982). Burns's complaint challenged Reed's authorization of the use of hypnosis, his action of securing a search warrant based upon an inadmissible and illegal interpretation of a confession, and his participation in an unlawful, warrantless arrest. The authorization of hypnosis and the securing of a search warrant are investigatory in nature while the participation in the arrest is a police function.

The question which must be addressed is whether deputy prosecutor Reed's activities of authorizing hypnosis and securing a search warrant are investigatory in nature or are quasi-judicial in nature. The Courts of Appeals for the Second, Tenth, and District of Columbia Circuits have held that prosecutors do not enjoy absolute immunity for investigatory functions. The Second Circuit, in *Liffiton v. Keuker*, 850 F.2d 73 (2d Cir. 1988) held that a prosecutor who applied to a court for a wiretap warrant was not engaged in a clearly prosecutorial function and therefore was not entitled to absolute immunity. Similarly, in *Barbera v. Smith*, 836 F.2d 96, *cert. denied*, — U.S. —, 109 S.Ct. 1338 , (2d Cir. 1988), the Second Circuit held that "the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution" are "of a police nature and are not entitled to absolute protection." *Id.* at 100 (emphasis supplied). The *Barbera* court distinguished these unprotected activities from "the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order" as being protected by absolute immunity. *Id.* at 100-101.



The Court of Appeals for the District of Columbia Circuit characterized the obtaining of unconstitutional search warrants and arrest warrants as investigatory in nature and therefore not protected by absolute immunity in *McSurely v. McClellan*, 697 F.2d 309, *cert. denied*, 474 U.S. 1005 (D.C.Cir. 1982). The District of Columbia Circuit, in *Apton v. Wilson*, 506 F.2d 83 (D.C.Cir. 1974) held that prosecutorial immunity was not available when a civil rights claim "focuses on a prosecutor's actions in the course of directing police investigative activity." *Id.* at 91.

In this case, Burns contends that Reed's authorization of the use of hypnosis is an investigatory activity and therefore should not be protected by absolute immunity. Reed's actions are more akin to the supervision of law enforcement agencies in acquiring evidence which may be used in a subsequent prosecution, rather than the organization, evaluation, or marshalling of evidence that would enable the prosecutor to try a case. Reed was called upon by the police to give advice on whether they should hypnotize Burns. The record reflects that Reed was informed by the police officers that the use of hypnosis in this case was probably an illegal and unacceptable police procedure. Nevertheless, Reed authorized this hypnosis. The evidence Reed could marshall or organize for prosecution purposes did not exist when he authorized the hypnosis or obtained the search warrant and therefore his actions are not of the nature that could be protected by absolute immunity. Most importantly, if Reed did view the videotape, then he observed, even to an untrained eye, one of the most abusive instances of forensic hypnosis ever practiced. Indeed, the defendant could not locate an expert to defend its use.[3]

The second question which must be answered is whether the giving of legal advice is a protected activity under *Imbler*. This Court has never directly addressed the issue of whether the giving of legal advice by a prosecutor falls within the *Imbler* doctrine. The Court of Appeals for the Seventh Circuit, however, directly addressed this issue in *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986). In *Henderson*, the plaintiff had paid a judgment in a child support proceeding yet was contacted by the sheriff's office and informed that he should either surrender himself or face arrest for the failure to pay child support.

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[3] The plaintiff's expert on forensic hypnosis desired to use the videotape as an instructional tool to demonstrate unacceptable hypnotic techniques.

Henderson presented himself with his receipt showing he had paid the judgment and therefore had complied with the court. The sheriff took Henderson to the assistant state's attorney's office where he sought advice on what should be done with Henderson. Lopez, the assistant state's attorney, advised that Henderson should be taken to the Cook County jail where he was held for three days.

The Seventh Circuit held that the assistant state's attorney enjoyed absolute immunity against lawsuits arising out of the assistant state's attorney's giving of legal advice. Similarly, the Court of Appeals for the Eleventh Circuit has held that a prosecutor enjoys absolute immunity for giving advice to police officers on the question of probable cause for arrest. The Tenth Circuit, however, held in *Benevidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983), that a prosecutor would be protected only by qualified immunity from section 1983 damages arising out of legal advice given to police officers. Again, the division in the Circuits on this issue calls for this Court to finally decide the issue.

The Courts of Appeals throughout the nation are divided on the issue of whether a prosecutor enjoys absolute immunity for activities outside the scope of initiating a prosecution and presenting the state's case. The Second, Fifth, Tenth, and District of Columbia Circuits have held that a prosecutor enjoys only qualified immunity for his activities outside the protected scope. *See, e.g., Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980); *Rex v. Teeples*, 753 F.2d 840 (10th Cir. 1985); and *McSurely v. McClellan*, 697 F.2d 309 (D.C.Cir. 1982). The Seventh, Ninth and Eleventh Circuits have held that a prosecutor enjoys absolute immunity for his activities outside the protected scope. *See, e.g. Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989); and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988).

This division in the Circuits illustrates the need for this Court to address these issues and to provide guidance to the Circuits. Even the Seventh Circuit, in the instant case, seemed to invite review, mentioning on two separate occasions the variance in the circuits in applying the meaning of *Imbler*. *SeeBurns v. Reed*, 894 F.2d at 954, n. 3, 955, n. 5. In addition, other Circuits have recognized this difficulty. *See, e.g., Marx v. Gumbinner*, 855 F.2d 783, 789 (11th Cir. 1988); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986). Without a clear rule of law from this



Court, a plaintiff's opportunity to redress genuine wrongs will depend directly on the geographical location of the prosecutorial abuse of constitutional rights. If a plaintiff brings suit in the Seventh, Ninth, or Eleventh Circuits, he or she will face insurmountable obstacles in successfully redressing the abuses of a prosecutor who violates the constitutional rights every citizen possesses. Worse, it will encourage police to hide behind prosecutors who extend their function to such a degree so as to participate in on-the-scene arrests, such as in this case. The continuity of deceit by police with the collusion of the prosecutor to and including the seeking of a search warrant will invite creative arrangements by which absolute immunity will extend to police activities. Indeed, the worst abuses may be protected by absolute immunity in those Circuits.

The Second, Fifth, Tenth, and District of Columbia Circuits, however, provide the opportunity for a wronged plaintiff to successfully pursue his or her claim against a prosecutor who has abused the constitutional rights of the plaintiff. The ability of a plaintiff to redress constitutional abuses should not be dependent on the geographical location of the abuses; therefore, this Court should decide the issues first pointed to in *Imbler* but which have remained unanswered.

## CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 5 is presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for petitioner to seek review of that question.

Respectfully submitted,

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In the

# United States Court of Appeals

## For the Seventh Circuit

No. 88-3397
CATHY BURNS,

*Plaintiff-Appellant,*

*v.*

RICK REED,

*Defendant-Appellee.*

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 85-155-C—**S. Hugh Dillin**, *Judge.*

ARGUED JUNE 1, 1989—DECIDED FEBRUARY 6, 1990

Before BAUER, *Chief Judge*, CUMMINGS, and RIPPLE, *Circuit Judges.*

BAUER, *Chief Judge.* The present appeal is from the district court's order granting defendant's motion for a directed verdict in this action for damages under 42 U.S.C. § 1983. After hearing plaintiff's evidence, the district court determined that defendant, the Chief Deputy Prosecutor for Delaware County, Indiana, was absolutely immune from suit for the allegations testified to at trial. The question before the court is whether a state prosecutor is absolutely immune from suit under § 1983 for his acts of giving legal advice to two police officers about their proposed investigative conduct, and for eliciting misleading testimony from one of the officers in a subsequent probable cause hearing.

## I. BACKGROUND

Muncie, Indiana police officers Paul Cox and Donald Scroggins were assigned to investigate a September 2, 1982, incident in which an unknown assailant entered Cathy Burns' home and rendered her unconscious by striking her with a blunt object. The intruder then shot Burns' sons Eddie Griffin and Denny Sells two times apiece while they slept. Before leaving, the assailant used a lipstick to scrawl the following message on Burns' bathroom mirror: "I took what you loved most." When Burns regained consciousness, she called the police in a hysterical state and reported the incident. She and her sons were subsequently taken to a local hospital and treated for their wounds.

After conducting an initial investigation of the incident, Officers Cox and Scroggins concluded that Burns was their prime suspect. They questioned Burns on numerous occasions after the incident, but she repeatedly denied shooting her sons. The officers asked Burns to submit to a polygraph examination. She did so, and the examination results supported her claims of innocence. Unpersuaded, Cox and Scroggins asked Burns to submit handwriting exemplars; these were also exculpatory. After conducting a voice stress test with negative results, the officers reached the only conclusion that would save their theory of the case: Burns was a multiple personality.

On September 21, 1982, the officers questioned Burns once more. This time, they persuaded her to submit to questioning under hypnosis as the only way to flesh out any further evidence concerning the incident. Before proceeding, Officer Cox reminded Scroggins that during their police academy training, it was stressed that the use of hypnosis on criminal suspects or defendants was an unacceptable investigative technique. Cox's recollection prompted the officers to call Chief Deputy Prosecutor Richard Reed, the police liaison attorney, to inquire about the propriety of placing Burns under hypnosis and questioning her. That afternoon, Scroggins called Reed at his





home and informed him of their desire to hypnotize Burns because she was the only one who could provide them with "additional information" about the incident. Scroggins testified that he informed Reed that Burns was their prime suspect in the shooting. Nonetheless, Reed told the officers that if hypnotizing Burns was their only remaining avenue, they should proceed.

With the assistance of an employee at a local supermarket chain, the officers hypnotized Burns and questioned her about the incident. During the video taped questioning, Burns described her assailant as someone wearing overalls, a halloween mask, and a dark wig. She also referred to the assailant as "Katie." After further questioning by the officers, Burns also made reference to herself as "Katie." The officers interpreted this response as evidence supporting their split personality theory and as a "confession" by Burns' other "self." When Burns was taken out of the hypnotic state, she reiterated her assertion that she had nothing to do with the shooting of her sons.

Soon after the hypnotic session, Officers Cox and Scroggins met with Reed at the station to ask his opinion about whether they had probable cause to arrest Burns. Reed stated that he thought they did. On the following day, Reed appeared at a probable cause hearing before a county court judge to obtain a warrant to search Burns' house and automobile. During that hearing, Reed elicited testimony from Officer Scroggins regarding Burns' alleged confession. At no point in the hearing did Reed ask Scroggins to clarify that Burns' alleged confession was in fact his interpretation of her hypnotically induced statements about "Katie." On the basis of Scroggins' misleading testimony, the judge found that there was probable cause to issue a search warrant. Burns' house and car were subsequently searched for items relating to the shooting.

On September 28, 1982, the judge issued a warrant for Burns' arrest after Jack L. Stonebraker, an investigator for the office of the Delaware County Prosecuting Attorney, submitted an affidavit in support of probable

cause. Again, the judge was not informed that the alleged confession was obtained while Burns was under hypnosis. After the judge issued the warrant, Burns was arrested for attempted murder and was detained in the psychiatric ward of Ball Memorial Hospital for four months.[1] During that time, Burns was observed and tested by several medical experts who concluded that she did not suffer from a multiple personality. For example, the doctor who was asked to examine Burns to determine her mental competency to stand trial offered the following conclusion:

> I do not find sufficient criteria to make a diagnosis of multiple personality. There are no episodes of depersonalization nor abrupt changes in personality. There were no homicidal ideation or inappropriate interactions with staff or family members. She is able to handle the stress of being on a psychotic unit as well as a fear of losing custody of her children and her employment with maturity. I doubt very much that Cathy shot her children. Dr. Phillip Coons of LaRue Carter Hospital in Indianapolis provided psychiatric consultation. Dr. Coons has had extensive training and experience with multiple personalities. It is of interest to note that he concurs that this patient does not have a multiple personality.

Prior to Burns' trial, the court granted her motion to quash the statements she made to officers Scroggins and Cox while under hypnosis. In the face of this development, the prosecutor's office dismissed all pending criminal charges against Burns. Nevertheless, Reed allegedly stated to the press that he thought Burns was in fact guilty of the crimes that had been charged.

At the conclusion of the foregoing ordeal, Burns filed the present § 1983 suit in federal court against Officers

[1] While Burns was detained, the state sought to obtain custody of her two sons based upon her alleged "confession." Burns was also discharged from her employment as a radio dispatcher for the Muncie Police Department.





Cox and Scroggins, Chief Deputy Prosecutor Reed, Investigator Stonebraker, as well as numerous other Muncie Police officials. Burns alleged, among other things, that the defendants violated her constitutional rights under the color of law. Each of the defendants moved for summary judgment, claiming that they were immune from suit. The district court denied the qualified immunity defenses of Cox and Scroggins because it found that their actions may well have violated Burns' clearly established constitutional rights. The court also denied Reed's claim of absolute immunity for his activities because Reed could not recall the vital facts regarding his role in the decisions to hypnotize Burns, to seek a search warrant, and to obtain a warrant for her arrest. Therefore, the court was unable to determine whether Reed was acting within the scope of his prosecutorial duties. Accordingly, it concluded that there were genuine issues of material fact which precluded summary judgment on Reed's behalf. Finally, the court found that investigator Stonebraker was neither absolutely nor qualifiedly immune from suit for submitting a knowingly false affidavit to the judge at the probable cause hearing.

Prior to trial, Officers Cox and Scroggins made a combined offer of judgment to Burns in the amount of $150,000. Stonebraker, in turn, made an offer of judgment in the amount of $100,000. Burns accepted these offers and proceeded to trial against Reed. Upon the close of Burns' case in chief, Reed moved for a directed verdict pursuant to Fed. R. Civ. P. 50. The parties briefed the motion and on November 8, 1988, the trial court entered a directed verdict in favor of defendant. The court found that Reed's act of giving legal advice to officers Cox and Scroggins and his appearance before the judge to seek the search and arrest warrants constituted conduct for which Reed was absolutely immune from suit. Burns timely filed the present appeal.

## II. ANALYSIS

Burns' central claim on appeal is that the district court committed reversible error when it determined that Reed was absolutely immune from suit for both the act of advising the officers that they should proceed to hypnotize her and for his act of eliciting false testimony during the probable cause hearings.[2] She contends that Reed's acts do not enjoy absolute immunity because they fall outside the scope of his prosecutorial duties since his conduct related to the investigation of her case. In light of this Circuit's interpretation of the Supreme Court's decision in *Imbler v. Patchman*, 424 U.S. 409 (1976), we conclude that the district court properly granted the defendant's motion.

In *Imbler*, the Court held that a prosecutor enjoys absolute immunity from suits for damages under 42 U.S.C. § 1983 when he or she acts toward "initiating a prosecution and in presenting the state's case." *Id.* at 431. After reviewing the basis for a prosecutor's absolute immunity from a malicious prosecution suits at common law—that

[2] Appellant also claims that the trial court applied an improper standard when it granted defendant's motion for a directed verdict because she presented a prima facie case against defendant. *See Hampton v. Hanrahan*, 600 F.2d 600, 607-08 (7th Cir. 1979). This argument misapprehends the basis for the district court's directed verdict in the present case. The determination of whether a prosecutor was acting within his or her quasi-judicial capacity and thus absolutely immune from suit is a legal question. If properly raised by the defendant, it is a matter to be decided by the trial court in light of the particular facts of the case regarding the actual conduct of the defendant. *Rakovich v. Wade*, 850 F.2d 1180, 1201 (7th Cir. 1988) (en banc) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). The district court granted Reed's motion for a directed verdict only after hearing the entirety of plaintiff's evidence against him and determining that Reed's alleged conduct fell within the ambit of his quasi-judicial functions as a prosecutor. The district court's reasoning makes it clear that it was applying the proper standard for a directed verdict in the context of an absolute immunity claim. *Rakovich*, 850 F.2d at 1204.





is, the functional comparability between the discretionary judgments of a prosecutor regarding evidence and that of a judge deciding a case—the Court determined that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424. One of the Court's central considerations was that if only qualified immunity were extended to the discretionary acts of a prosecutor, he or she would be open to suits that would undermine the performance of his or her responsibilities by diverting the prosecutor's energy and attention "away from the pressing duty of enforcing the criminal law." *Id.* at 425. The upshot would be that:

> public trust of the prosecutor's office would suffer if he [or she] were constrained in making every decision by the consequences in terms of his [or her] own potential liability in a suit for damages. Such suits could be expected with some frequency, . . . . Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

*Id.* at 424-25. Finally, the Court reasoned that if prosecutors approached their law enforcement duties ever fearful of their potential liability, the criminal justice system as a whole would be impaired. *Id.* at 426-27.

In determining that a prosecutor's absolute immunity at common law applies to suits under § 1983, the Court explicitly reserved the question of whether absolute immunity also extends to "those aspects of the prosecutor's responsibility that cast him [or her] in the role of an administrator or investigative officer rather than an advocate." *Id.* at 430-31. Moreover, the Court fully recognized that under its functional test, the sundry duties of a prosecutor would not always be easy to pigeon-hole:

> We recognize that the duties of the prosecutor in his [or her] role as advocate for the State involve actions preliminary to the initiation of a prosecution and ac-

> tions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his [or her] duty as such, to make decisions on a wide variety of sensitive issues. These include questions whether to present a case to the grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing the proper lines between these functions may present difficult questions . . . .

*Id.* at 431 n. 33.

The Court's functional test for determining the reach of a prosecutor's absolute immunity has engendered a case-by-case approach to the question. *See Marx v. Gumbinner*, 855 F.2d 783, 789 (11th Cir. 1988) ("the dividing line is amorphous, and the process of determining on which side of the line particular kinds of conduct fall has proceeded on a case-by-case basis").[3] In this circuit, which

[3] Ironically, the case-by-case approach engendered by the Court's functional test may well undercut, in part, the rationale supporting absolute immunity. As the Court noted in *Imbler*, "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler*, 424 U.S. at 419 n.13. The rationale, of course, is to avoid the personal, institutional and social cost associated with such suits. *See e.g. Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (highlighting the personal and social costs of suits against public officials). However, since the conduct, for example, of a prosecutor in initiating a case as opposed to conducting investigative activities is not altogether clear and can be arguably placed on either side of the prosecution/investigation line, cases involving such claims often proceed to the federal appellate courts for resolution. *See e.g. Marx*, 855 F.2d at 789 n.10 (citing cases).





has visited the issue on a number of occasions, the functional test has been applied broadly in instances where state officials are required or called upon to render legal opinions or advice. For example, in *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), we reaffirmed that the Indiana Attorney General acts in a quasi-judicial capacity when reviewing the legality and form of state contracts pursuant to state statute. *Id.* at 671 (reaffirming *Citizen Energy Coalition of Indiana, Inc. v. Sendak*, 594 F.2d 1158 (7th Cir. 1979)). With reference to the Attorney General's determination of the legality of a contract, we likened this duty to "the everyday 'work' of lawyers and judges," and found it distinguishable from mere ministerial tasks. *Id.* at 674 n.4. Upon applying the factors enumerated in *Butz v. Economou*, 438 U.S. 478 (1978), for determining whether official conduct enjoys absolute immunity,[4] we concluded that the Indiana Attorney General is absolutely immune from suit under § 1983 when making such legal determinations. *Id.* at 471-75.

In *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986), we drew upon our analysis in *Mother Goose* to determine whether an Illinois state's attorney is absolutely immune from suit when giving advice to a county sheriff about

[4] We determined that the Supreme Court's decision in *Butz v. Economou* required consideration of three factors:

> First, we examine the historical or commonlaw basis for the immunity in question. Second, we examine whether the functions which the official performs subjects him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to retaliate the underlying conflict and 'charg[e] the participants in the first with unconstitutional animus.' And third, we consider whether the official is subject to checks upon abuses of authority, such as the correction of error on appeal.

*Mother Goose*, 770 F.2d at 671 (citations to *Butz*, 438 U.S. at 512, omitted).

whether to detain an individual on contempt charges. Upon reviewing the factors delineated in *Butz*, we concluded that an assistant state's attorney functions in a quasi-judicial role when providing such legal advice to county officials. Accordingly, we held that a state's attorney is absolutely immune from suit under § 1983 for the consequences of his or her legal advice. *Id.* at 47.

A number of other circuits have reached similar conclusions by applying the Supreme Court's functional analysis in *Imbler*. In *Marx v. Gumbinner*, 855 F.2d at 790, for example, the Eleventh Circuit held that a prosecutor rendering legal advice to police officers regarding the existence of probable cause to make an arrest is absolutely immune from suit. The court reasoned that a prosecutor's legal determination regarding the existence of probable cause is part and parcel of the larger process of determining whether to initiate a prosecution. The *Marx* Court thus concluded that a prosecutor's act of rendering legal advice about an arrest was within the ambit of prosecutorial activity covered by the Supreme Court's decision in *Imbler*. *Id.* at 790-91. Similarly, in *Myers v. Morris*, 810 F.2d 1437 (8th Cir.) *cert. denied*, 108 S. Ct. 97 (1987), the Eighth Circuit held that a prosecutor is absolutely immune from suit when he or she provides "advice of law to enforcement officials concerning the existence of probable cause and the prospective legality of the arrest." *See also Thomas v. Riddle*, 673 F. Supp. 262, 264 (N.D. Ill.1987) (applying *Henderson*). On the other hand, the Tenth Circuit has reached the opposite conclusion, a decision which it recently reaffirmed.[5]

[5] In *Wolfenbarger v. Williams*, 826 F.2d 930 (10th Cir. 1987), the Tenth Circuit revisited its decision in *Benavidez v. Gunnell*, 722 F.2d 615, 617 (10th Cir. 1983) (district attorney is not absolutely immune from suit for giving legal advice to police officers), in light of this circuit's decision in *Henderson*. The *Wolfenbarger* Court declined to overrule *Benavidez* and reaffirmed that a district attorney's act of giving legal advice to police officers is not protected by absolute immunity.





The question presented in the case at hand is whether the reach of our decisions in *Henderson* and the other circuits' decisions in *Marx* and *Myers* should be extended to instances where a state prosecutor is asked by a police officer to provide a legal opinion about the propriety of proposed investigative conduct.[6] Following this Circuit's reliance on *Butz*, we conclude that a prosecutor is absolutely immune from suit when acting as a legal advisor to police officers.

Admittedly, our review of the historical or commonlaw basis for the immunity in question does not yield any direct support for the conclusion that a prosecutor's immunity from suit extends to the act of giving legal advice to police officers. Nonetheless, an early decision by the Indiana Supreme Court reveals the breadth of the reasoning supporting the immunity at commonlaw. In holding that a prosecutor is absolutely immune from suit for malicious prosecution, the court drew upon the following principle:

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.

*Griffith v. Slinkard*, 146 Ind. 117, 119, 44 N.E. 1001, 1002 (Ind. 1896) (quoting Townsh. Sland. & L. (3d Ed.) § 227, pp 395-96)). Under this articulation of the commonlaw principle, the dispositive question is whether the conduct of

[6] At the outset, we must reject appellant's contention that Reed's act of presenting evidence before the county judge in the probable cause hearings was part of the investigative stage of the case rather than action taken "in initiating a prosecution and in presenting the state's case." *Imbler*, 424 U.S. at 431.

the prosecutor is of a judicial nature and requires the prosecutor to exercise analogous judgment. In *Henderson*, we concluded that when a state's attorney serves as the legal advisor to county officials, she functions in a manner similar to both her role as a prosecutor and to that of a judge. "[I]n both functions, the state's attorney has the responsibility to review the facts of a given case and to arrive at an opinion concerning legality. . . . when functioning as an advice giver, the state's attorney has the ultimate decision on legality." *Henderson*, 790 F.2d at 46. This same conclusion applies here since an Indiana prosecutor's statutory responsibilities are sufficiently parallel to those of an Illinois state's attorney. *See* I.C. 33-14-1-3 and 33-14-1-4.

Under *Butz*, the second factor we must consider is whether the prosecutor's functions as a legal advisor to police officers subjects the prosecutor to "the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process." *Mother Goose*, 770 F.2d at 671. We have little doubt that a prosecutor's risk of becoming entangled in litigation based on his or her role as a legal advisor to police officer is as likely as the risks associated with initiating and prosecuting a case. As the present case illustrates, police officers do turn to a prosecutor when they are uncertain about the legality of a possible investigative technique. And this is as it should be. We do not hesitate to recognize that the decision at hand should be guided, in part, by sound policy considerations. With that in mind, it is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutor's from fulfilling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques,





and the possibility that their proposed conduct will violate the rights of their suspects.

The third factor which we must consider is whether there are sufficient checks upon the prosecutor to prevent abuses of the authority to render legal opinions free from liability. The first check upon such abuses lies in the judicial process itself. As the Supreme Court has recognized, "the judicial process is largely self-correcting: procedural rules, appeals and the possibility of collateral challenges obviate the need for damages to prevent unjust results." *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). Prosecutors well know that investigative techniques resulting in the violation of a suspect's constitutional rights will result in the suppression of evidence prior to trial or on appeal. Furthermore, a prosecutor who abuses his or her powers will have to answer to the electorate every four years. *See* Ind. Const., art. 7, § 16 (prosecutors elected every four years). Additionally, a prosecutor may be professionally disciplined. *Imbler*, 424 U.S. at 429. Consideration of the foregoing factors reveals that a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct. We emphasize that a prosecutor steps outside of his or her quasi-judicial role when he or she actually participates in investigative conduct. Under our decision, such conduct is not accorded absolute immunity.

The remaining question is whether Reed merely gave legal advice to Officers Cox and Scroggins or whether he participated in the investigation. The officers testified that they called Reed at his home to seek his advice about the propriety of their intentions to hypnotize and question the appellant. Officer Cox testified that they called Reed because he was the police liaison for the Prosecutor's office. Both officers emphasized that they were seeking Reed's legal opinion about their proposed course of action. Based on the foregoing testimony, it is apparent that Reed was rendering legal advice to the officers and

should be immune from suit, even if he did render unsound advice.[7]

For the foregoing reasons, the district court's order directing the verdict in favor of the defendant is hereby

AFFIRMED.

RIPPLE, *Circuit Judge*, concurring. I concur in the judgment and opinion of the court. I write separately to stress the limited scope of the court's holding. The court holds that a prosecutor enjoys absolute immunity with respect to *legal advice* given to law enforcement officers; it does not hold that such absolute immunity necessarily extends to situations in which the prosecutor goes beyond rendering legal advice and assumes responsibility for the management of the investigation. The line between rendering legal advice and making policy decisions during an investigation is a relatively difficult one. *See Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976). Here, however, the record supports the district court's explicit conclusion that the prosecutor's role was limited to rendering legal advice. On that basis, I join the judgment and opinion of the court.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

[7] Appellant also argues that Reed's act of rendering a legal opinion to Officers Cox and Scroggins was the equivalent of a final decision by an official policy maker. Although the Supreme Court has confirmed that a single decision by a public official can amount to a policy decision, Reed did not purport to do anything more than render his opinion about the conduct being proposed. *See Pembaur v. Cincinnati*, 475 U.S. 469, 484 (1986) (respondent did not merely give legal advice, but was statutorily empowered to establish county policy). Appellant's reliance on *Pembaur* is unavailing under these facts.

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**Appendix B**
**Opinion of the United States District Court**
**for the Southern District of Indiana**
**Dillin, D.J.**

The following is a reproduction of the transcript of the District Court's decision on the motion for a directed verdict made by Mr. David Nowak, attorney for Rick Reed, on November 4, 1988.

THE COURT: When we began this case, there were four areas in which the defendant was charged with violating the constitutional rights of the plaintiff. One was that he authorized this hypnosis. Another was that he participated in the arrest without a warrant and in obtaining a search warrant without probable cause and that he defamed or slandered the plaintiff after she was released by making certain statements to the newspapers.

According to the *Henderson* case, a prosecuting attorney or deputy prosecuting attorney has absolute immunity when what he does is done in a quasi-judicial role. I am sure there is no dispute about that fact as established in *Imbler v. Pachtman*, the Supreme Court case.

The question is whether he is operating in a quasi-judicial role. The *Henderson* case, which is a Seventh Circuit interpretation of *Imbler v. Pachtman* to some extent at least, even though it doesn't mention it, sets up certain criteria for determining whether or not the prosecuting attorney is acting in a quasi-judicial role. And it says flat out that giving advice, legal advice, is operating or acting in a quasi-judicial role.

Now, the testimony in this case about Defendant Reed is both the police officers--Cox and the other officer, Scroggins--agree that they called Reed on the phone at his home. Well, his home is immaterial. But, anyway, they called him on the phone and asked if it would be proper or permissible to hypnotize the plaintiff. And he said yes.

I don't think there is any question that is giving legal advice. He didn't initiate it. He didn't suggest it. According to his testimony, which is the only positive testimony on the subject, he was home cutting his yard or something. At least he was home when the call came. So he was giving legal advice.

On the seeking of the arrest without a warrant, there is a conflict in the evidence as to whether the plaintiff was arrested before or after someone talked to Mr. Reed. But the evidence that someone did talk to Mr. Reed was simply that the police officer asked Reed if in his opinion there was probable cause for the arrest of the plaintiff; to which the response was yes. There again, that's calling for a legal opinion which he gave. He says he was under the impression there was a separate confession other than on the tape or on the hypnotic session which, of course, there was not. But that's beside the point. The question was is there probable cause to arrest this lady. And he said yes, I think so. That's a legal opinion.

Finally as to getting the search warrant, you can characterize the proceeding before the judge as testimony by Mr. Reed. And if he asked leading questions--and I think he did--why, of course, you can say that. But the fact is that it was a proceeding in court before a judge. No matter what the form of the question was, the person seeking the search warrant and doing the testifying was the police officer. And what Mr. Reed was doing was doing his job as a deputy prosecuting attorney and presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties.

The fourth phase was publicity. There is no evidence at all on that.

So under the authority of the *Henderson v. Lopez* case, having heard the plaintiff's evidence, I find with some regret that I feel compelled to take this matter from the jury and return a finding pursuant to Rule 50 in favor of the defendant.

I say with some regret because this is a very interesting case. And I would really like to know what the jury would have done with it. There is no question, of course, that what these police officers did was in violation of the plaintiff's rights.

I certainly don't believe that the plaintiff shot her sons. I certainly would not wish the news media to give any impression that the evidence here in any respect would reflect upon the plaintiff. The evidence here discloses that the police officers up there at Muncie conducted a highly improper--you might call it a--well, highly improper all-day interrogation of the plaintiff, refused to let her go to lunch, kept after her when she was sick, conned her into submitting to hypnosis, and then suggested a number of things to her when she gave answers that they didn't like.



I am wholly in accord with the testimony of the psychiatrist--and the psychologist, I believe--that this was a highly improper thing for them to do.

But, of course, she has recovered substantial judgments against both of these police officers and also the third party as I recall. So the question this week was simply what does she have against Mr. Reed. Well, Mr. Reed is not to be patted on the back for not having gone into this matter a little more deeply. It's easy to say that in afterthought.

But, on the other hand, and as a practical matter, we know that attorneys are called on every day and very frequently to give opinions in all sorts of matters. It's easy to say after the fact he was careless or negligent. But the real question is did he have absolute immunity when acting as a lawyer in giving legal advice and presenting a matter in court. And the answer to that is yes, he did. That's my view.

And, therefore, judgment, as I said, will be entered for the defendant. Bring in the jury.

MR. SUTHERLIN: Your Honor, at some point, may I address the Court before the jury is brought in just very briefly. I know the Court has made its ruling. I neglected to make a couple of arguments.

THE COURT: Go ahead.

MR. SUTHERLIN: Because the Court prohibited us from eliciting from any of the witnesses the law on the role of the prosecutor and his duties--we couldn't present evidence because it's a matter of law--Mr. Dick Good would have testified that under the scheme of the judicial system in the State of Indiana, the prosecutor is considered a constitutional officer. And his definition places him under the judiciary, unlike in other states in the federal system where he is under the executive branch. He would have also offered his opinion that the prosecutor can as a judicial officer arrest. That's one thing.

The decision to comment on probable cause may in fact be a group decision to arrest. As the Court is well aware, arrest doesn't take place simply because the strong arm of the law is placed on the shoulder of a defendant.

It's based upon circumstances. The reading of *Henderson* though suggests very clearly the distinction, and I hope that the Court would have noted the distinction. In *Henderson* there was a statutory provision which required that the assistant attorney to give legal advice. We heard over and over again that

the function of the attorneys in this state or the prosecutors in this state are clearly defined by statute and no other way. There is no statutory provision in the State of Indiana, no provision whatsoever, no case that they can cite which permits the prosecutor to give advice and still have absolute immunity.

THE COURT: Well, you can take that up to the Seventh Circuit, Mr. Sutherlin.



## Appendix C
## Transcript of Hearing before The Honorable Betty Shelton Cole held on September 22, 1982

The following is a reproduction of the transcript of the hearing regarding probable cause for the issuance of the search warrant.

THE COURT: Alright. Alright, Mr. Reed? Proceed, please.

RICHARD W. REED, ESQ.: Yes, your Honor. This is the matter of a probable cause by sworn testimony for the purpose of obtaining a search warrant and I would ask that the Court swear the witness, Lieutenant Scroggins.

THE COURT: Alright. Lieutenant Scroggins, please raise your right hand and be sworn.

DONALD SCROGGINS, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

QUESTIONS BY RICHARD W. REED:

Q. State your name to the Court, please.
A. Donald Scroggins.
Q. And, your occupation, sir?
A. Police officer for the city of Muncie.
Q. Did I get your rank right? Are you Lieutenant or is it Sergeant?
A. At the present time, I am a Sergeant.
Q. And, are you in the Investigative Division of the Muncie Police Department?
A. Yes. I am.
Q. Ah, Sergeant Scroggins, did there come a time when you investigated the shooting of two children?
A. Yes. I did.
Q. And, when did that shooting occur?
A. September the third, nineteen-eighty-two.
Q. And, ah, were those the children of one Cathy Sells?
A. Yes. They were.
Q. And, did you go to the residence during your investigation?
A. Yes. I did.

Q. And what did your investigation reveal concerning the children being shot?
A. Our investigation revealed that the oldest child had been shot twice in the head and the youngest child has been shot twice in the body.
Q. Did there come a time during the course of your investigation when you, ah, had occasion to, ah, interview Cathy Sells, the mother of these two children?
A. Yes. I did.
Q. And, was that yesterday?
A. Yes.
Q. Among other times?
A. Yes.
Q. And, during that interview, did Cathy Sells eventually say to you that she had shot those children?
A. Yes. She did.
Q. And, did she also tell you that at the time she was doing that, ah, that she was wearing a Halloween mask? A certain curly wig, dark in color and Afro in style and a pair of coveralls?
A. Yes. She did.
Q. Did she also tell you that she shot these children with a certain twenty-two caliber handgun described as a shiny one with broken grips and twenty-two caliber ammunition?
A. Yes. She did.
Q. Did she tell you, ah, that since that shooting, she has been moving and that the house that she was moving from is located on east thirteenth street, a two-story frame house with white aluminum siding with glassed-in front porch and the second house being the second house east of south Elm Street on the north side of east Thirteen Street in Muncie, Delaware County, Indiana known as four-o-six east Thirteenth Street?
A. That's true.
Q. And, that after the shooting, she started moving some of her property to a one-story frame house with white wood siding, the first house west of south Madison Street on the north side of east Thirteenth Street, Muncie this residence having an address of four-sixteen east Thirteen Street, Muncie, Indiana?



A. Ah, I don't know if I understood you correct, but, she lived at four-sixteen east Thirteenth and she's moving to four-o-six east Thirteenth.
Q. So, she told you last night, last night being the twenty-first day of September, nineteen-eighty-two, that she had moved, that there is property of hers in both those places?
A. Yes. She did.
Q. Did she also tell you that she had, ah, and do you know for a fact she has a green nineteen-seventy-eight Datsun automobile, nineteen-eighty-two Indiana registration eighteen-A-sixty-nine-thirty?
A. Yes. She did.
Q. And, did she tell you during the interview last night that the wig and the Halloween mas, ah, the handgun and the coveralls could be in any of those three locations and that she was not sure in which particular house all of those items might be found?
A. Yes. She did.
Q. Or that they might even be in her car since she was in the process of moving these things back and forth?
A. Yes. She did.
Q. But, she did, in fact, tell you, did she not, that they would be in one of those places?
A. Yes. She did.
Q. And, is this the basis for your seeking a search warrant to discover those items which are evidence of a crime?
A. Yes. It is.
Q. The events to which you have testified occurred in Delaware County, Indiana. Is that correct?
A. Yes. They did.
Q. Is there anything else you'd like to tell the Judge about that?
A. No.
MR. REED: That's all, your Honor.
THE COURT: Thank you. Very well, the Court, is there any further testimony, sir?
MR. REED: No, your Honor.
THE COURT: The Court specifically determines that probable cause exists for the search of the premises at four-o-six east Thirteen Street, also four-sixteen east Thirteen Street and a certain green nineteen-seventy-eight Datsun automobile, all as per the testimony given this date at, ah,

two-forty-five P.M., September the twenty-second, nineteen-eighty-two.
MR. REED: Thank you, your Honor.
THE COURT: Thank you.
(OFF RECORD)



## Appendix D
## Statutory Provisions

42 U.S.C. § 1983 (1982) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Indiana Code 33-14-1-3 (1971) reads as follows:

**Duty when informed of crimes.**--Whenever any prosecuting or district attorney shall receive information of the commission of any felony or such district attorney of the commission of any misdemeanor he shall cause process of issue from a court having jurisdiction to issue the same, (except the circuit court,) to the proper officer, directing him to subpoena the persons herein named likely to be acquainted with the commission of such felony or misdemeanor, and shall examine any person so subpoenaed before such court touching such offense, and if the facts thus elicited are sufficient to establish a reasonable presumption of guilt against the party charged, said court shall cause so much of said testimony as amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to by such witness, whereupon such court shall cause process to issue for the apprehension of the accused as in other cases.

Indiana Code 35-33-1-1 reads as follows:

**Arrest by law enforcement officers.**--A law enforcement officer may arrest a person when:

(1) He has a warrant commanding that the person be arrested;

(2) He has probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit a felony;

(3) He has probable cause to believe the person has violated the provisions if IC 9-4-1-40, IC 9-4-1-54 [repealed], or IC 9-11-2; or

(4) He has probable cause to believe the person is committing or attempting to commit a misdemeanor in his presence [IC 35-33-1-1, as added by Acts 1981, P.L. 298, § 2; P.L. 204, § 6; P.L. 320-1983, § 2.]

Indiana Code 35-41-1-17 reads as follows:

**Law enforcement officer.**--"Law Enforcement Officer" means:

(1) A police officer, sheriff, constable, marshal, or prosecuting attorney;

(2) A deputy of any of those persons; or

(3) An investigator for a prosecuting attorney. [IC 35-41-1-17 as added by P.L.311-1983, § 18].

(2)

No. 89-1715

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

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CATHY BURNS,
*Petitioner,*
vs.
RICK REED,
*Respondent.*

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT


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No. 89-1715

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

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CATHY BURNS,
*Petitioner*,
vs.
RICK REED,
*Respondent*.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 89-1715

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

CATHY BURNS,
*Petitioner*,

vs.

RICK REED,
*Respondent.*

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Respondent, Rick Reed (hereinafter Reed), respectfully prays that the Court deny the Petition For Writ Of Certiorari To The United States Court Of

Appeals For The Seventh Circuit filed by the Petitioner, Cathy Burns (hereinafter Burns), and affirm the decision of the United States Court of Appeals For The Seventh Circuit (hereinafter Seventh Circuit) and the United States District Court For The Southern District of Indiana (hereinafter District Court).

## STATEMENT OF THE CASE

The question presented herein is purely legal. Both the District Court and the Seventh Circuit found that the only action taken by Reed was to provide legal advice to police officers and to present the State's case to a state court judge during a hearing on an application for a search warrant. The only issue raised is whether such conduct is protected by the doctrine of absolute immunity.

On September 2, 1982, an unknown person entered the home of Burns, shot her sons and attacked her with a blunt instrument (T. 157-8). Muncie police officers Cox and Scroggins conducted the investigation of this crime (T. 22).

On September 21, 1982, Burns was given a voice stress test, interrogated and threatened by police officers (T. 164-7). Cox and Scroggins then decided to place Burns under hypnosis. Up to this point in time, Reed had



no contact with or involvement in the police investigation (T. 65-6, 111).

Reed's first involvement in this case was on the afternoon of September 21, 1982 when Officer Scroggins made a telephone call to Reed (T. 66). Officer Cox explained the reason for the phone call as follows:

> Q. And what was the conversation that you heard even though it was one-sided?
>
> A. The extent of the conversation was that we were at the time contemplating a hypnosis session with Cathy and that we wanted him to give us his opinion on whether or not we should do that. At that particular time, I think Mr. Reed was a police liaison attorney as far as the police department was concerned. I can't say the exact words, but I indicated to Don to explain to him that we were aware of the fact that hypnosis of suspects may not be admissible as far as criminal proceedings were concerned; and we did advise him that she had indicated to us she wanted to do that and we wanted to know from him whether or not he felt we should proceed.

* * * *

Q. What is your recollection about being told by Mr. Scroggins of Mr. Reed's response?

A. Mr. Scroggins indicated to me that Mr. Reed indicated to us if we had no other avenue to explore, we might as well do that.

(T. 101-2).

Officer Scroggins testified as to the reason for the phone call as follows:

A. I said that Cox and I had determined that we felt like she was the only one that could provide us additional information of the investigation and that we wanted to hypnotize her; but Cox had advised me that her being a possible suspect, that in his training, he was told that you do not hypnotize suspects.

* * * *

Q. What did you tell Mr. Reed about Cathy Sells status as a suspect?



A. The conversation with Reed was brief. It was mostly just to advise him of the point we were at in the investigation and the request from him for permission to hypnotize her.

Q. What was Mr. Reed's response.

A. He said for us to go ahead.

(T. 37, 67).

Reed does not recall the telephone conversation in question nor does he dispute Officer Cox's and Scroggin's testimony concerning the telephone conversation (T. 125, 127). It must be noted that Reed was not advised that Burns was a suspect (T. 36) nor was he informed of any of the details of the case such as: that Burns had failed a PSE exam, how long Burns had been at the police station, that she had become ill while at the police station, that police officers had threatened Burns or that Burns had been deprived of lunch (T. 66-7).

Other than advising the police officers to proceed with the hypnotic session, there is no evidence to indicate that Reed was involved with the hypnotic session or the events leading up to the session. Reed

in no way instructed the officers on how to proceed with the hypnotic session (T. 113). Shortly after the hypnotic session, Officers Scroggins and Campbell arrested Burns (T. 67-9, 72, 114).

Either during the hypnotic session or shortly thereafter, Reed received a phone call requesting that he come to the police station to give some advice on the Burns case (T. 125-6). Reed recalls the reason for his attendance at the police station as follows:

> Generally, I arrived at the detective headquarters. The only person I recall speaking to was Dr. Ken Joy. When I arrived, he was already there. But he began to tell me about what was going on. I didn't recall speaking to Officer Cox or Scroggins or any of the other officers.
>
> I do recall seeing them there. I asked Dr. Joy what was going on. He proceeded to tell me about this hypnosis session that he had either witnessed or viewed a tape of. I asked him some questions about it; in response to which he told me that what he had seen gave him cold chills; that he thought it was quite possible we had a real case of split personality and this was a person who needed to be in the hospital and not in jail.



> Somebody--I think it was Dr. Joy--asked me if that was possible if she could go to the hospital instead of jail. I gave my opinion that could be done.

(T. 130-1).

Officer Cox described the reason for Reed's presence at the police station and the advice given as follows:

> Q. Did Mr. Reed participate in the decision to arrest Cathy at that time based upon the information you had supposedly obtained from her under hypnosis?
>
> A. The extent of his participation was my explaining to him what we had developed as a result of the hypnotic session and asking if he felt like we had probable cause to make that arrest. It was decided during the discussion, of course, to—that she would not be kept in the Delaware County Jail; that she would be taken to Ball Memorial Hospital.

And, in fact, in order for us to take her to the hospital and have her committed to the psychiatric floor for examination we had to have an official police hold put on her which was the arrest.

Q. When you asked Mr. Reed of his opinion about probable cause, what was his response?

A. Mr. Reed indicated that we probably had probable cause for the arrest.

(T. 107-8, see also, T. 115).

Officer Scroggins described Burns' arrest and Reed's involvement in the arrest as follows:

A. I told her we were going to arrest her at that point.

Q. Prior to that time though, excluding the telephone conversation with Mr. Reed, did you discuss with Mr. Reed the decision to arrest Cathy Sells?

A. No. That's not the policy. We arrest people. The police department arrests people. And



the prosecutor's office is the one that actually files the formal charge.

Q. Is it a practice—my next question is is it a practice for you to consult with the prosecutor's department or office before you arrest an individual?

A. No.

Q. And you did not do so in this case?

A. No.

* * * *

Q. Did you and Mr. Reed and anyone else you can think of engage in a discussion about whether or not to arrest Cathy?

A. I was in the room. And Marvin Campbell had come in the room. And they were the ones that actually arrested Cathy and advised her that she was being placed under arrest.

Q. So the decision to arrest, if it took place, you don't recall whether Mr. Reed was

part of that or you didn't hear him being part of that?

A. No, I didn't hear. The only involvement that I can recall Mr. Reed being involved in was after we had filled out the arrest sheet on Cathy. Then we went into the hallway. And Mr. Reed and Mr. Joy, Captain Cox, and Deputy Chief Bodkin was there. And the decision was made then whether to take her to the hospital rather than take her to jail . . .

(T. 69, 38-9).

The day following Burns' arrest, Reed and Officer Scroggins appeared before the trial court and obtained a search warrant for the search of Burns' residences. It is undisputed that the trial judge was not informed of the fact that Burns' only confession, which formed the probable cause for the warrant, was obtained through the use of a hypnotic session. Burns' made no other confession.

In explaining his failure to inform the trial court of this fact, Reed stated:

A. My testimony is that when I was questioning Lieutenant Scroggins in front of Judge Cole, I was under the assumption that he had



interviewed her and gotten a confession from her. We are not talking about the hypnosis session. I knew about that. I had been there the following evening.

(T. 136).

Reed's testimony is clear that he was under the impression that Burns had confessed in an interview other than the hypnotic session. He was provided this information from another individual thought to be Michael Alexander (T. 134-140, 147-8). It is undisputed that Reed's impression of the facts was erroneous. Other then Reed's in-court participation in obtaining the search warrant, Reed had no other involvement in the search (T. 121).

Burns has attempted to argue that Reed either participated in a decision or instructed the police officers in question to conceal the fact that the confession was obtained from a hypnotic session. Such a contention simply lacks any evidentiary support. Officer Scroggins, who testified at the search warrant hearing, testified that he had no prior discussion with Reed concerning his testimony and was never instructed by Reed not to talk about hypnosis (T. 50-1, 46, 48, 137). None of the witnesses indicated that there was an attempt to conceal the fact that the confession was obtained pursuant to a hypnotic session (T. 109,133).

Eight days later, a prosecution against Burns was initiated and an arrest warrant was obtained (T. 11-2). It is undisputed that the affidavit of probable cause, which justified the issuance of the arrest warrant, failed to make any reference to the fact that Burns' confession was obtained pursuant to hypnosis.

There is absolutely no evidence in the record that Reed made any statements to the press. In fact, the contrary is true (T.130, 147, 110, 51).

After a week of trial and at the conclusion of Burns' case, the District Court granted Reed's motion for a directed verdict. The District Court found that the evidence established that Reed's only involvement in the case was to render legal advice to police officers, to represent the State in a state court proceeding concerning an application for a search warrant and to initiate a criminal prosecution. Pursuant to this evidence, the District Court held that Reed was entitled to absolute immunity for his activities. (See, Burn's Appendix, p. 15a). The Seventh Circuit affirmed the District Court's decision. (See, Burn's Appendix, p. 1a).

## SUMMARY OF THE ARGUMENT

A prosecutor's act of rendering legal advice to police officers and appearing before a trial court to seek a



search warrant are quasi-judicial functions to which absolute immunity must attach.

## ARGUMENT

In *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976), this Court issued an opinion which held "that in initiating a prosecution and in presenting a State's case, the prosecution is (absolutely) immune from a civil suit for damages under § 1983". This limited holding affords Reed absolute immunity for his conduct in initiating the Burns' prosecution by the filing of an information and seeking a warrant for the arrest of Burns.

*Imbler* recognized that not all activities of a prosecutor would be protected by the grant of absolute immunity. If a prosecutor engages in investigative activities, he is entitled to a qualified immunity or a "good faith defense comparable to the policeman's". Id., at 430, 96 S.Ct. at 984. However, activities of a prosecutor which are an "'integral part of the judicial process'" were to be afforded the protection of absolute immunity. Id., at 430, 96 S.Ct. at 984.

Reed maintains that his activities of appearing before a trial court, presenting evidence in support of an

application for a search warrant and obtaining such a warrant are in fact an "integral part of the judicial process". Only a prosecutor can appear before a trial court and request the issuance of a search warrant (T. 5). A prosecutor is clearly acting within the scope of his duties in engaging in such conduct. Such an appearance before a court must be considered an "integral part of the judicial process" since a search warrant cannot be issued without the prosecutor's involvement.

It is undisputed that the trial court herein was not informed that the confession from Burns, which was the sole basis for the search warrant, was obtained as a result of a hypnotic session. Reed explained that he was under the mistaken impression that there was a second confession which was obtained in the absence of a hypnotic session. Burns argues, without evidentiary support, that Reed intentionally lied to or mislead the Court so as to assure the granting of the application for a search warrant. Such a dispute in the evidence does not affect the applicability of absolute immunity.

*Imbler* recognized that absolute immunity must be afforded to prosecutors irrespective of their intent. This Court stated:

> We conclude that the considerations outlined above dictate the same absolute immunity under



> § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutors immunity would deserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Id., at 425-6, 96 S.Ct. at 993-4.

Furthermore, the majority in *Imbler* specifically held that absolute immunity would apply to, as in the instant case, allegations that a prosecutor willfully suppressed exculpatory information. Id., at 411, N. 34, 96 S.Ct. at 995-6, N. 34. In sum, absolute immunity applies to a prosecutor's participation in court proceedings where the prosecutor requests the Court to issue a search warrant. Any dispute as to the motives of the prosecutor or the reason for the failure to provide the trial court with relevant information is simply irrelevant.

As previously noted, the *Imbler* holding was a limited one. While this Court recognized that a prosecutor's activities in initiating a prosecution were entitled to absolute immunity and actions of an investigative nature were afforded qualified immunity, this Court failed to further explain the type of activities which would fall into either category. Instead, this Court stated:

> It remains to delineate the boundaries of our decision.

Id., at 430, 96 S.Ct. at 994.

In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this Court listed three factors for determining whether an official's conduct enjoyed absolute immunity. The Seventh Circuit has applied the factors in *Butz* as follows:

> First, we examine the historical or commonlaw basis for the immunity in question. Second, we examine whether the functions which the official performs subjects him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to retaliate the underlying



> conflict and 'charge[e] the participants in the first with unconstitutional animus.' And third, we consider whether the official is subject to checks upon abuses of authority, such as the correction of error on appeal.

*Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), (citations to *Butz*, 438 U.S. at 512, omitted).

The Seventh Circuit carefully examined each of these factors and found that absolute immunity attached to the function of rendering legal advice. (See, Burn's Appendix, p. 1a).

In Indiana, the duties of a prosecutor are set out by statute. I.C. 33-14-1-1 et seq. An Indiana prosecutor is the state's attorney responsible for the prosecution of all crimes. It would be quite impossible for a prosecutor to effectively perform the function of his office without being able to contact and advise police officers on legal matters. The failure of police officers to follow the law can and will jeopardize any prosecution. A prosecutor must, therefore, render legal advice to assure effective prosecution of criminals and such conduct should be encouraged. To subject a prosecutor to § 1983 actions without the cloak of absolute immunity for the rendering of legal

advice would surely diminish the effectiveness of a prosecutor. The fear of vexatious litigation could, and in all probability would, cause prosecutors to refrain from rendering any legal advice to police officers and that in turn could seriously hamper the state's ability to effectively prosecute criminals. Reed concludes that such activities of a prosecutor are an "integral part of the judicial process" which this Court sought to protect when it issued its opinion in *Imbler* and the Seventh Circuit correctly decided all issues presented.

## CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court deny the Petition for Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit and for any and all other relief just and proper in the premises.

Respectfully submitted,

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No. 89-1715

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

CATHY BURNS

*Petitioner,*

*vs.*

RICK REED

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 7, 1990
CERTIORARI GRANTED JUNE 28, 1990

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## I. RELEVANT DOCKET ENTRIES

| DATE | ENTRY |
|---|---|
| 31 January 1985 | Complaint filed by Plaintiff Cathy (Sells)Burns[1]. |
| 25 March 1986 | Court grants motion to dismiss as to various Defendants and denies motion as to Defendants Reed, Cox, Scroggins and Stonebraker. |
| 4 April 1986 | Defendant Reed files answer with affirmative defenses. |
| 16 May 1986 | Defendant Reed files motion for summary judgment. |
| 1 May 1987 | Court denies motions for summary judgment on Defendants Reed, Cox, Scroggins, and Stonebraker. |
| 17 February 1988 | Defendants Cox, Scroggins, and Stonebraker offered a combined offer of judgment of $250,001.00. |
| 26 February 1988 | Plaintiff Burns filed notice of acceptance of offers of judgment. |
| 29 February 1988 | Court enters judgment against Defendants Cox, Scroggins, and Stonebraker. |
| 19 August 1988 | Defendant Reed files another motion for summary judgment. |
| 7 October 1988 | Court denies motion for summary judgment. |

[1] Ms. Burns changed her surname from Sells to Burns when she married.

| | |
|---|---|
| 31 October 1988 | Trial by jury began with remaining parties Burns and Reed. |
| 4 November 1988 | Court grants Defendant's motion for directed verdict at the conclusion of Plaintiff's evidence. |
| 8 November 1988 | Court enters judgment for Defendant Reed; Plaintiff to pay costs of action. |
| 5 December 1988 | Burns files notice of appeal. |
| 27 December 1988 | Burns files memorandum of jurisdiction in response to Circuit Court query as to final judgment. |
| 28 February 1989 | Burns files brief. |
| 6 February 1990 | United States Court of Appeals for the Seventh Circuit affirms District Court's order directing verdict in favor of Defendant Reed. |
| 7 May 1990 | Burns files petition for writ of certiorari. |
| 28 June 1990 | Certiorari granted. |

II. OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA
DILLIN, D.J.

Petitioner Burns respectfully directs this Court to the Petition For A Writ of Certiorari Appendix B which contains the above referred to opinion.



III. JUDGMENT FOR DEFENDANT ON MOTION FOR A DIRECTED VERDICT

(Caption Omitted)
JUDGMENT

This action having come on for trial before the Court and jury and the Court having granted defendant's motion for directed verdict at the conclusion of plaintiff's evidence,

IT IS ADJUDGED that the plaintiff take nothing by her complaint as to defendant Rick Reed and her complaint is now dismissed,

IT IS FURTHER ADJUDGED that the plaintiff pay costs of this action.

Dated this 8 day of November, 1988.

S. HUGH DILLIN, JUDGE

(Distribution omitted)

IV. OPINION OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BURNS V. REED, 894 F.2d (7th Cir. 1990)

Petitioner Burns respectfully directs this court to the Petition For A Writ of Certiorari which contains the above opinion beginning at 1a.

V. TRANSCRIPT OF HEARING ON PROBABLE CAUSE FOR ISSUANCE OF SEARCH WARRANT; DELAWARE COUNTY, INDIANA SUPERIOR COURT NO. 2; HONORABLE BETTY SHELTON COLE.

Petitioner Burns respectfully directs this Court to the Petition For A Writ of Certiorari Appendix C which contains the above transcript testimony.

(R. 5, 7-11 Plaintiff's Exhibit 24)

No. 89-1715

**IN THE SUPREME COURT OF THE UNITED STATES**

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CATHY BURNS
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED MAY 7, 1990
CERTIORARI GRANTED JUNE 28, 1990

## QUESTIONS PRESENTED

I. Is a deputy prosecutor entitled to absolute immunity when he gives approval to conduct which is known or should be known to him to be improper, namely, the authorizing of the use of hypnosis on a suspect?

II. Is a deputy prosecutor entitled to absolute immunity when he seeks a search warrant in a probable cause hearing and intentionally fails to fully inform the court that the arrested person made an alleged confession while under hypnosis and yet had persistently denied committing any crime before and after the hypnosis?

III. Is a deputy prosecutor entitled to absolute immunity when he participates in the unlawful arrest of an individual when under state law the prosecutor possesses the same arrest powers as police officers?

IV. Are such activities individually and collectively outside the protected activities of initiating a prosecution and presenting the state's case?

V. Is it a question of fact for the jury to decide whether an activity is investigative when the veracity of the witnesses and the conflict in the testimony do not define the issue of immunity purely as a matter of law?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner Cathy Burns[1] and the Respondent Rick Reed[2], Deputy Prosecutor for Delaware County, Indiana.

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[1]Ms. Burns changed her surname from Sells to Burns when she married.
[2]Rick Reed was sued individually and in his official capacity.

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2. Reed's decision to approve a warrantless arrest was investigatory. ..... 20

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C. Disciplinary action and criminal prosecution for prosecutorial misconduct are nonexistent as alternative checks on Reed's deeds ..... 23

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No. 89-1715

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

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CATHY BURNS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# BRIEF OF PETITIONER

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 894 F.2d 949 and is reprinted in the appendix to the Petition for Writ of Certiorari, p. 1a.

The decision of the United States District Court for the Southern District of Indiana (Dillin, D.J.) has not been reported. It has been transcribed and reprinted in the appendix to the Petition for Writ of Certiorari, p. 15a.

## JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the Southern District of Indiana. Petitioner proceeded to trial and on November 4, 1988, the Southern District granted respondent's motion for a directed verdict.

On petitioner's appeal, the Seventh Circuit affirmed the district court's order directing a verdict in favor of the respondent on February 6, 1990. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of 42 U.S.C. § 1983 and Indiana Code provisions 33-14-1- 3 (1971), 35-33-1-1 (1971) and 35-41-1-17 (1971) are reproduced verbatim in the Petition For a Writ of Certiorari, Appendix, p. 19a.

## STATEMENT OF THE CASE

This case was initiated by Cathy Burns on January 31, 1985, by the filing of a complaint in the United States District Court, Southern District of Indiana, against Rick Reed, the Deputy Prosecutor, Delaware County, Indiana.[3] Burns sought actual and punitive damages against Reed for violation of her constitutional rights while acting under color of state law. Victimized by the wrongful investigatory conduct of Reed in collusion with the police officers, Cathy Burns' only redress is through the enforcement of her rights by the provisions of 42 U.S.C. § 1983. The District Court had jurisdiction over the case

[3]The original complaint named ten Defendants. The claims against Defendants Muncie Police Department and several other individuals were dismissed by the Trial Court. The case continued against Defendants Scroggins, Cox and Stonebraker, investigating officers in the Muncie Police Department, and Rick Reed, a Deputy Prosecutor for Delaware County, Indiana. Scroggins, Cox and Stonebraker settled with Burns for sums of money totalling $250,001.00. The case against Reed continued to trial.



pursuant to the provisions of 28 U.S.C. § 1343(a) 3 and 4, as the suit was brought under 42 U.S.C. § 1983 to redress the deprivation of Burns' constitutional rights.

On the evening of September 2, 1982, an unknown person entered the home of Cathy Burns, Petitioner. The intruder shot her two sons, Eddie Griffin and Denny Sells, and attacked her with a blunt instrument (R. 157-58). Cathy Burns, a reserve police officer working as a civilian radio dispatcher for the Muncie Police Department, managed to fire one shot from her service revolver before the intruder overpowered her, knocking her unconscious (R. 158-59). She was awakened by one of her children and after assessing the injuries to both of them, called the police dispatcher in a hysterical state (R. 42). A message, "I took what you loved most," was scrawled on a mirror with lipstick (Pl. Exhibit 88). All three received medical treatment. Eddie Griffin underwent surgery at Methodist Hospital in Indianapolis, Indiana and Denny Sells was hospitalized at Ball Memorial Hospital in Muncie, Indiana.

After a period of time, Muncie Police Officers, Cox and Scroggins formed the opinion that Cathy Burns was a prime suspect in the shooting (R. 75). Although there was no admissible or reliable evidence to establish probable cause (R. 23-24; 110-111), the officers remained focused on Cathy Burns. They questioned her on numerous occasions but she repeatedly denied shooting her sons. The officers asked Cathy Burns to submit to a polygraph examination and she did so (R. 23). The examination results supported her claim of innocence.[4] Cathy Burns also submitted to numerous handwriting examples and they also were exculpatory.[5] On the morning of September 21, 1982, the officers asked Burns to submit to a voice stress test which again produced negative results. They continued their interrogation throughout the day of September 21, 1982 (R. 81, 103-105), and denied her the opportunity for any food, causing her to become so lightheaded that she fainted while at the detective's office (R. 166). This dizziness and the fact that she vomited in the restroom did not deter Officers Cox and Scroggins from pursuing their theory and persuading her to submit to questioning under hypnosis (R. 168-169). Reed was contacted at home before Burns

[4]Testimony of State Trooper Coffin, the polygraph examiner, is not part of the record on review, (Pet. App. 2a).

[5](Pet. App. 2a)

was placed under hypnosis. Reed approved and authorized the hypnosis despite being warned by Officer Scroggins that Cox was trained not to examine suspects under hypnosis. Reed recalled no such conversation and testified only that he was contacted at home sometime after 5:00 P.M. (R. 36, 101-102). Officer Cox, now having permission, placed Burns in a hypnotic state and videotaped the questioning.[6] Cox, with Scroggins in the room, continued the interrogation of Cathy while she was hypnotized and on numerous occasions challenged her truthfulness and placed her under a deeper and deeper trance.[7] While under hypnosis, Cathy made statements which Cox and Scroggins interpreted as evidencing a multiple personality. The videotape of the hypnosis also shows that there was an unscrupulous post-hypnotic suggestion made by Cox that *she would not remember the hypnosis and would cooperate fully with their investigation of the crime* (Pl. Exhibit 112). Reed came down to the detective's office that same evening but does not recall viewing the video, contrary to the officers' testimony (R. 63, 127). Cox was emphatic in his testimony that Reed viewed the video (R. 107). Officers Cox and Scroggins and Deputy Prosecutor Reed discussed the video hypnosis of Burns and the officers specifically requested Reed's advice or permission as to whether or not to make a warrantless arrest of Cathy Burns (R. 107-108). Cox added that he probably would not have arrested Burns if Reed had indicated otherwise (R. 116). Reed, Scroggins and Cox decided to arrest Burns (R. 114-16).

Officer Cox had a meeting with Reed and Scroggins in which it was decided that they would not reveal to the public that Cathy Burns had been hypnotized or what their source of information was regarding various matters of evidence (R. 109).

The following day, Officer Scroggins and Chief Deputy Prosecutor Reed sought a search warrant from the Honorable Judge Betty Cole (R. 4-11, 45-47). At the hearing for the search warrant Reed told the Judge of Burns' "confession," but he did not tell her it was obtained while Burns was under hypnosis (R. 47-49). The Judge also was not told of the two stated claims of

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[6]The Seventh Circuit's opinion incorrectly states that Burns was hypnotized with the assistance of an employee at a local supermarket chain (Pet. App. 3a) (See R. 24).

[7]See Dr. Elgan Baker's video deposition for analysis of procedure and instructional film.



innocence by Cathy Burns. Judge Cole issued the search warrant totally ignorant of the basis of the information presented by Reed (R. 11-12).[8] It was not necessary or required that Reed or any prosecutor be present for a hearing on probable cause to seek a search warrant (R. 15-16).

Cathy's children were removed from her custody immediately. Eight days after her arrest and six days after the search warrant was obtained, Jack L. Stonebraker, the police liaison with the Delaware County Prosecuting Attorney's Office, submitted an affidavit to Judge Cole in support of probable cause to issue an arrest warrant (Pl. Exhibit 24, R. 11-12). Again, the information presented did not inform the court that the interrogation of Cathy Burns occurred while she was under hypnosis. Burns was detained in the psychiatric ward of Ball Memorial Hospital when the Judge issued the warrant charging her with attempted murder of her own children, and she remained in the psychiatric ward for approximately four months. During that time, Burns was observed and tested by several medical experts who concluded that she did not suffer from a multiple personality. For example, Dr. Buonanno, who was asked to examine Cathy for her mental competency to stand trial, offered the following conclusion:

> I did not find sufficient criteria to make the diagnosis of multiple personality. There are no episodes of depersonalization or abrupt changes in personality. There is no homocidal ideation or inappropriate interaction to staff and family members. She is able to handle the stress of being on a psychotic unit as well as fear of losing custody of her children and her employment with maturity.[9]

Dr. Phillip Coons of LaRue Carter Hospital in Indianapolis provided psychiatric consultation. Dr. Coons has extensive training and experience with multiple personalities (Pl. Exhibit 33). He concurred with Dr. Buonanno that Cathy did not have a multiple personality (Pl. Exhibit 37). The criminal court granted

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[8]Entire testimony found Pet. App. 19a, compare to Pl. Exhibit 24.

[9]See Pet. App. 4a.

her motion to quash the statements that she made to Officers Scroggins and Cox while under hypnosis. In the face of this development, the prosecutor's office dismissed all criminal charges against her.

Because of media attention and damaging statements made by the police and Reed, as well as remarks made by the fathers of the minor children, the civil court felt it was in the best interest of the children that they not be returned to their mother. The oldest child, Eddie, was allowed to return in 1986 (R. 185), but the younger child was not permitted by his father to live with Burns, nor was Burns permitted regular visitation until 1988 (R. 185). Following Cathy's release, she attempted to regain her employment with the Muncie Police Department but was unable to do so because of accusations made during her employment hearing and in public by various police officers and Deputy Prosecutor Reed. Reed gave a public interview indicating he still considered her the primary suspect. His public statements interfered with her ability to gain employment and continued to provide a basis for the fathers of the minor children to resist any mother-child contact.

## SUMMARY OF ARGUMENT

I.

The Court of Appeals erred in according absolute immunity to the prosecutor for his actions of authorizing hypnosis of a suspect, participating in a warrantless, unlawful arrest and in seeking a search warrant based on his deceitful and unscrupulous presentation to the court. The persistent investigatory involvement of Reed occurred before formal charges were filed, thus ensuring that Cathy Burns was not protected by proper representation or the provisions of the Fourth, Fifth and Fourteenth Amendments.

Cathy Burns seeks reversal of the trial court's directed verdict and a declaration that Reed's investigatory conduct is not protected by absolute immunity. The Petitioner asks this Court to hold prosecutor Reed's conduct to be unlawful.

There is no persuasive public policy which specifically excuses prosecutorial misconduct that precedes the formal filing of criminal charges. The legislative history of 42 U.S.C. § 1983 and its plain language makes no exception to forgive or protect



prosecutors for unconstitutional conduct. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

A succession of important cases, *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Butz v. Economou*, 438 U.S. 478 (1978); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) have imposed on the circuits the functional test as a means of balancing competing public policy concerns.

The Supreme Court has consistently found support in the common law and in its contemporary fashioning of public policy to clothe prosecutors with absolute immunity for conduct which is intimately associated with the bringing of criminal charges and presenting the state's case. But Cathy Burns was egregiously harmed by the conduct of Reed, which properly characterized was investigative and therefore, under *Imbler*, not protected by absolute immunity. Each of Reed's acts was the functional equivalent to that of a police officer conducting an investigation aimed at solving a crime. Reed's decision precluded judicial review because the arrest of Cathy was warrantless.

In her appeal from the district court, Burns was required to address the Seventh Circuit precedents which resolved the issue of conduct by definition. Burns does not accept the Seventh Circuit's definition of "advice," nor is she persuaded that "advice" is protected prosecutorial conduct embraced within the quasi-judicial limits which *Imbler* held to be totally immune.

Under Indiana Statutory Law, the prosecutor has the same arrest powers as a police officer (I.C. 35-33-1-1 and 35-41-1-17; Pet. App. 24a). Reed was as much an arresting officer of Cathy Burns as Officers Cox and Scroggins. There were no exigent circumstances that would require an immediate, warrantless arrest. If the arrest is found to be unlawful or is in violation of the constitutional rights of Burns, Reed should suffer the same risks of liability as the police officers under 42 U.S.C. § 1983, who paid a judgment of $250,001.00.

The joint decision by Reed, Cox and Scroggins not to inform the public of the source of new information (alleged confession obtained under hypnosis as revealed by a multiple personalty) was manifested the following day when Reed deliberately lied to the court so as to obtain a search warrant.

While Burns does not accept the Seventh Circuit Court of Appeals' interpretation of the functional approach enunciated in *Imbler*, she nonetheless asserts that even under its broader immunity doctrine, Reed's conduct is investigatory.

II.

The jury should resolve *all* questions of fact. While there is some conflict in the evidence, for purposes of granting a directed verdict, all reasonable inferences must be allowed to the non-moving party, and the evidence must be viewed in the light most favorable to the party opposing the motion. See *Kole v. Chrysler Corp.*, 661 F.2d 1137, 1140 (7th Cir. 1981).

Cathy Burns was denied the right to have a jury decide whether Reed's conduct was unlawful. The trial court's characterization of his actions preempted her right under the First Amendment to petition the government for redress of grievances. The Seventh Circuit decision precludes the jury from fairly defining the conduct. If the conduct is deemed investigatory by the jury after weighing the facts, then Reed should be held liable.

## ARGUMENT

Prosecutors are to be protected by absolute immunity for activities intimately associated with bringing prosecution. Only those acts which are prescribed by law to be undertaken by a prosecutor should be protected. All other activities of investigation more typically done by police are not protected by immunity. Such protection for non-judicial acts invites arrogant misuse of power as found in the warrantless arrest of Cathy and the shameful and contemptible use of forensic hypnosis which was viewed by Reed. The duplicity was brought into court by Reed, who willfully disregarded his oath of office and procured a search warrant by lying.

I.

PUBLIC POLICY CONSIDERATIONS PRECLUDE IMMUNITY FOR PROSECUTORIAL CONDUCT WHICH IS INVESTIGATIVE.

A. PROSECUTORS ARE VESTED WITH IMMUNITY FOR ACTIVITIES INTIMATELY ASSOCIATED WITH INITIATING PROSECUTION AND PRESENTING THE STATE'S CASE.

In 1976 this Court addressed the issue of prosecutorial



immunity in the case of *Imbler v. Pachtman*, 424 U.S. 409 1976). While there are some conflicts among the testimony of Burns, Reed, Cox and Scroggins, the trial court's ruling and the affirmation by the Seventh Circuit Court of Appeals emphasized the policy considerations which they found in *Imbler* and related immunity cases. Following the rationale of *Butz v. Economou*, 438 U.S. 478 (1978) *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 884 (1986); and *Henderson v. Lopez*, 790 F.2d 94 (7th Cir. 1986), the Seventh Circuit upheld the trial court's ruling which granted Reed's motion for a directed verdict at the close of Plaintiff's case.

A synthesis of the policy reasons for prosecutorial immunity is basically this: qualified immunity would impair the proper operation of the judicial system by hampering the prosecutor in his duty by (1) taking up all his time, and (2) taking away his vigor and independence; this fact, coupled with the existence of other checks on prosecutorial misconduct, outweighs the public interest in seeing that legitimate § 1983 plaintiffs recover for their constitutional injuries. Cathy Burns accepts this rationale as applied to conduct intimately associated with initiating a prosecution and presenting the state's case, but rejects this rationale as applied to a prosecutor's actions of "giving advice". Cathy Burns does not believe that prosecutors are deterred by disciplinary action or potential prosecution.

While it is laudable and should be encouraged that police seek advice before acting *without* judicial approval, it does not follow that the Fourth Amendment, requiring "that no warrant shall issue but upon probable cause," should be circumvented to the serious detriment of the constitutional rights of citizens. The prosecutor is entrusted with the administration of justice and is to protect the innocent as well as convict the guilty. See *Brady v. Maryland*, 373 U.S. 83 (1963). To this end he must remain objective and detached from investigative activity. The record in this case demonstrates that Reed was not objective and was clearly not detached.

The Constitution and the Bill of Rights in companion with 42 U.S.C. § 1983 are formidable legal weapons to vindicate wrongs suffered by Plaintiffs. The Fourth, Fifth and Fourteenth Amendments are intended to shield citizens from excesses of governmental power and overreaching police authority.

It is ironic that police associations regard many Supreme Court decisions which have imposed sanctions in the form of exclusionary rules as anathema to effective law enforcement. The Fourth Amendment protects all. The fairness of the criminal justice system should be assured by a fair reading of the Fourth Amendment and 42 U.S.C. § 1983.

The founding fathers were less than two generations removed from a Europe wrought with religious persecution, sovereign tyranny and prosecutorial fiat. There has been an evolving meaning of many terms and principles—privacy, cruel and unusual punishment, due process and sovereign immunity[10], to name a few, and they are constantly refined in response to contemporary social, political and moral questions.

The notion that power in the hands of those that govern, and particularly that aspect of governance within the criminal justice system, is carefully and particularly balanced with countervailing forces, due process, avenues of appeal and remedies both equitable and legal has been the subject of commentary from de Toqueville to Judge Learned Hand.[11]

The Western presumption of human nature and the political philosophies of Locke and Rousseau manifest themselves in the specific prohibition against governmental abuse and guarantees of individual liberty found in the Bill of Rights. The checks and balances apparatus has been called "a vast system of brokerage and accommodation." The system attempts to promote conciliation, but conciliation is frustrated when basic liberties are denied.

A survey of cases reveals that most of the circuits have interpreted *Imbler* narrowly because immunity is an exceptional protection against tort liability and should be extended no farther than necessary. The Courts of Appeals for the Second, Tenth, and District of Columbia Circuits have held that prosecutors do not enjoy absolute immunity for investigatory functions. The Second Circuit, in *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988), held that a prosecutor who applied to a court for a wiretap warrant was not engaged in a clearly prosecutorial function and therefore was not entitled to absolute immunity. Similarly, in *Barbera v. Smith*, 836

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[10]See Prosser and Keeton on Torts, sec. 131, 5th Fd. (1984); Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation § 7.13-7.14, McGraw Hill (1986).

[11]Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).



F.2d 96, *cert. denied*, __ U.S. __, 109 S.Ct. 1338 (2nd Cir. 1988), the Second Circuit held that "the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution" are "of a police nature and are not entitled to absolute protection." *Id.* at 100 (emphasis supplied). The *Barbera* court distinguished these unprotected activities from "the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order" as being protected by absolute immunity. *Id.* at 100-101.

The Court of Appeals for the District of Columbia Circuit characterized the obtaining of unconstitutional search warrants and arrest warrants as investigatory in nature and therefore not protected by absolute immunity in *McSurely v. McClellan*, 697 F.2d 309, *cert. denied*, 474 U.S. 1006 (D.C.Cir. 1982). The District of Columbia Circuit, in *Apton v. Wilson*, 506 F.2d 83 (D.C.Cir. 1974), held that prosecutorial immunity was not available when a civil rights claim "focuses on a prosecutor's actions in the course of directing police investigative activity." *Id.* at 91.

In this case, Burns contends that Reed's authorization of the use of hypnosis is an investigatory activity and therefore should not be protected by absolute immunity. Reed's actions are more akin to the supervision of law enforcement agencies in acquiring evidence which may be used in a subsequent prosecution, rather than the organization, evaluation, or marshalling of evidence that would enable the prosecutor to try a case. Public policy requires that Reed be held accountable for his misconduct.

The office of prosecutor is often regarded by many to be the most powerful office in elected county government. It is the discretionary power of the office which permits criminal charges to be brought under the statutory scheme in Indiana and in most states. To assist the prosecutors in this most difficult task, many state jurisdictions have associations or councils which provide instructional material and training seminars so these elected prosecutors and deputies may be informed of the latest rulings and policies in the criminal justice system. In the case of Cathy Burns, the prosecutor's manual was introduced as Pl. Ex. 111. It contained public policy considerations of the office. As an officer entrusted with the administration of justice, it is generally recognized that the prosecuting attorney should seek justice, and to protect the innocent as well as convict the guilty. The Indiana

Court of Appeals addressed the ethics of the office in the case of *Palmer v. State*, 288 N.E.2d 739, 755 (Ind. App. 1974):

> It is our opinion that the duty of a prosecuting attorney, when he first comes in contact in his official capacity with a criminal case, is that he must look upon the same and act toward the same with the same impartiality as a judge does throughout all preliminaries and the trial of the cause itself.
>
> It is the duty of the prosecuting attorney to represent the person charged with the crime with the same zeal and vigor that he may later use for the State in the trial of the cause, to see that the person is not erroneously charged, tried and convicted, and that all his rights and his freedom are protected. On the other hand, it is also his duty to determine if the person charged with the crime is guilty of that crime and from his investigation to determine if he should be prosecuted and if prosecuted would a conviction be proper.

The American Bar Association Code of Professional Responsibilities which was adopted on March 8, 1971, addressed the duty of the prosecuting attorney in Ethical Considerations 7-13(b):

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as the selection of cases to prosecute, (2) during trial the prosecutor is not only an advocate, but he also may make decisions normally made by an individual client and those affecting public interest



> should be fair to all, and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.

In addition, Disciplinary Rule 7-103 states:

> DR 7-103: <u>Performing the Duty of Public Prosecutor or Other Governmental Lawyer</u>
>
> (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has not counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

These ethical considerations impose upon the prosecutor a duty to be forthright and fair in the execution of justice. They focuse primarily on the activities of the prosecutor after the initiation of criminal charges. The role of the prosecutor is to prosecute. His objectivity and impartiality would be seriously impaired if he became involved in investigations, interrogation of suspects and interview of witnesses. The protection in the Fourth Amendment suggests that there may be two impartial public officials involved in the initial determination of issuing a search warrant or an arrest warrant, namely: a magistrate and the prosecutor. How easy it is for the prosecutor, in his zeal to solve a heinous crime or to satisfy the public's demand for instant justice, to urge either inadvertently or perhaps even deliberately on a court the issuance of a warrant on false or dishonest pretenses. Absolute immunity should not shield a prosecutor in his investigatory activities from wrongful conduct any more than it should shield a police officer who exceeds the limited power

granted to him. Indeed, a prosecutor with powers greater than those of a police officer must be restrained from wrongful conduct.

The reality of the criminal justice system places the prosecutor and police in a daily working relationship, a symbiotic relationship, each dependent on the other to produce favorable statistics. Police departments must act efficiently and successfully in order to justify requests from the various fiscal bodies or in obtaining Law Enforcement Administration Assistance grants. So, too, prosecutors, in order to remain in office, must obtain a high conviction rate and demonstrate sternness in the sentencing phase of the trial. Where are the checks and balances to initially prohibit police and prosecutors from infringing upon the liberty interests of citizens? It is unlikely, and human nature would suggest it is improbable, that a prosecutor would criminally charge those officers for perjury or false arrests, officers upon whom he generally exclusively depends for apprehensions of suspected criminals. It is just as improbable that criminal court judges would discipline or sanction prosecutors for pre-trial misconduct. In the criminal justice system there is no rule analogous to Rule 11 of the Federal Rules of Civil Procedure.

The public policy objective to enhance the professionalism and integrity of police officers who have a very difficult job in our society is not assailed. However, to that end, prosecutors should not be actively involved in either giving advice or in investigating criminal activity. Those actions are best left to other legal advisors. If the prosecutor desires supplemental or independent investigation, he can no doubt have officers assigned to work with him. This is generally contemplated in a grand jury proceeding in which witnesses are subpoenaed to appear and testify. To some extent it is inevitable that a prosecutor would have to work closely with various police officers in order to know who to subpoena before a grand jury and what evidence exists to support probable cause. But Reed did not present his case to a grand jury or a judge. Giving permission to Cox to engage in improper, if not unconstitutional, conduct was a serious infringement of Burns' liberty interests. This action by Reed served no legitimate prosecutorial objective. It is comparable to the prosecutor giving permission for a warrantless search of a person's residence, knowing that any information obtained would be suppressed. Here again the Fourth Amendment seems to



recommend a clear line which would prescribe the limits of the prosecutor's function.

In defining "scope of authority," non-judicial actions should not be protected whether the conduct under scrutiny is that of a judge or a prosecutor. The Seventh Circuit incorrectly extended absolute immunity to judges in the case of *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986) with Judge Posner dissenting. Applying the functional analysis, this Court refused to extend absolute immunity to administrative or executive functions. *Forrester v. White*, 484 U.S. 219, 223-229 (1988). Included in the functional approach is an examination of the constitutional and statutory scheme. The Indiana Constitution governing Reed's conduct provides:

> **Prosecuting attorneys**.--There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall have been admitted to the practice of law in this State before his election, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election. The election of prosecuting attorneys under this section shall be held at the time of holding the general election in the year 1974 and each four years thereafter. Indiana Constitution, Article 7 section 16 (as added November 3, 1970.)

There are no other references in the Indiana Constitution to the office of prosecuting attorney. The duties of the office are set out by the statute and again define the scope of Reed's authority.

Indiana Code 33-14-1-3 (1971) is set out verbatim in Pet. App. 23a. Other relevant provisions are:

Indiana Code 33-14-1-4 (1971):

> **Duties**.--Such prosecuting attorneys, within their respective jurisdictions, shall conduct all prosecutions for felonies, misdemeanors, or infractions and all suits on forfeited recognizances; and superintend, on behalf of counties or any of the trust funds, all

> suits in which the same may be interested or involved, and shall perform all other duties required by law.

Indiana Code 5-6-1-2 (1971):

> **Oath and duties.**--Such deputies shall take the oath required of their principals, and may perform all the official duties of such principals, being subject to the same regulations and penalties.

It would appear that public policy, if manifested in constitutional and statutory language, would put a prosecutor on notice as to the scope of his authority and possible penalties for exceeding the scope of his authority.

Reed's giving permission or authorization to Cox and Scroggins, Reed's decision regarding probable cause and arrest of Cathy Burns, and Reed's decision with Cox and Scroggins not to make known to the public the circumstances of Cathy Burns' alleged confession are not merely advice but are more properly characterized as investigatory activities *and* outside the scope of defined authority.

The Indiana Supreme Court has commented on that point:

> We first note that, although the office of Prosecuting Attorney is provided for in our Indiana Constitution, he receives his authority to act from the Legislature. Where the Legislature has enumerated the powers incident to any given office and the Constitution is silent as to the duties of that office, the Legislature's enactment is final, and supersedes any residual authority that office may have had at common law.

*Mounts v. State*, 496 N.E.2d 37 (Ind. 1986).

If Reed was acting outside the scope of his statutorily defined authority, then public policy should not endorse any conduct which is found to be unconstitutional or leads to constitutional deprivations. As mentioned in the concurring opinion in *Imbler*, the purpose of providing immunity to a judicial officer is to allow



him to freely act upon his own convictions without apprehension of personal consequences to himself and to remain independent. *Imbler*, 424 U.S. at 436. However, if his acts are not judicial, that is, not intimately associated with deciding to file criminal charges, then judicial independence is not at issue. Burns believes that public policy as discussed in *Imbler*, as set forth in the Fourth Amendment to the United States Constitution, and as discussed by several circuits would not excuse Reed's conduct and would not extend either absolute immunity or qualified immunity to protect him from both compensatory damages and punitive damages.

*Imbler* cautions that the threat of § 1983 suits would undermine the vigorous and fearless performance of a prosecutor's duties by deflecting his energies. The Court's fears might be unfounded. One commentator undertook an empirical study of 1983 actions and concluded that the volume of 1983 cases posed no serious threat to the court system. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 524 (1982).

The courts have voiced other public policy concerns. The public trust of the prosecutor's office would suffer if the decision-making was constrained by potential liability. But the contrary is more likely if the John Mitchells and Rick Reeds are perceived by the public as acting above the law, especially when there is no adversarial system to ensure the rights of a primary suspect.

The idea that acquitted criminal defendants would be bitter and translate this ordeal into animus for the prosecutor is another reason advanced for prosecutorial immunity. But this particular concern is inapplicable in the instant case as all of Reed's conduct was prior to formal filing of criminal charges. There is no defendant to prosecute. Cathy Burns was wrongfully arrested. There was no acquittal—her right to justice must surely go beyond dismissal of all criminal charges.

There are some activities that only prosecutors can perform: initiating a criminal case and trying it for the government. These activities occur in court. They are subject to judicial scrutiny and take place in an adversary context. These activities are protected by absolute immunity. But investigative activities that are undertaken by either or both prosecutors and police officers are not absolutely immune from civil challenges. Rather, when the prosecutor acts as part of the investigative team, that prosecutor like a police officer is entitled to qualified immunity.

This line which distinquishes such conduct is supported by the precedent of this Court. Subjecting investigative activities by prosecutors to qualified immunity does not seriously risk impairing the function of that office. As this Court stated in *Mitchell v. Forsyth*::

> We emphasize that the denial of aboslute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexations complaints. Under the standard of immunity in *Harlow v. Fitzgerald*, the Attorney General will be entitled to immunity so long as his actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of *Harlow*: 'Where an official could be expected to know that this conduct would violate statutory or constitutional rights, he should be made to hesitate.' 472 U.S. at 524 (emphasis in original) (citations omitted).

## B. PROSECUTOR REED'S CONDUCT IS PROPERLY CHARACTERIZED AS INVESTIGATIVE.

### 1. REED'S ACTION IN GIVING ADVICE OR PERMISSION TO HYPNOTIZE, KNOWING IT WAS IMPROPER, SHOULD BE CHARACTERIZED AS INVESTIGATORY AND ACCORDINGLY IS NOT CONDUCT PROTECTED BY ABSOLUTE IMMUNITY OR QUALIFIED IMMUNITY.

The Seventh Circuit focused on the initial contact of Officers Cox and Scroggins with Deputy Prosecutor Reed when they sought "advice" on whether or not to proceed with the hypnotic interrogation of Cathy Burns. Such activity of the prosecutor is arguably both advisory and investigatory, and one characterization should not exclude the other, and neither is quasi-judicial.



While arriving at a definition in some ways is arbitrary, it nonetheless facilitates the discussion as long as the participants in the discussion agree on the fairness of the definition.

In the Burn's decision, the Seventh Circuit found support for its interpretation in *Imbler* in the Eighth Circuit, in the case of *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), which concluded:

> [I]n providing advice to law enforcement officials concerning the existence of probable cause and the prospective legality of arrest, Morris was functioning in a quasi-judicial capacity as a prosecutor initiating the formal judicial process.

810 F.2d at 1448.

In this holding Circuit Court Judge Frost cited the Seventh Circuit opinion of *Henderson, supra* to support his definitional conclusion, thus admitting to a mutual regard on this point. But the parties themselves, Cox and Scroggins, did not call Reed for "advice."

In his affidavit (Pleading No. 19) Cox states:

> 4. I talked with and obtained approval of chief deputy prosecuting attorney, Richard Reed, before hypnotizing Cathy Sells on September 21, 1982. (Emphasis added.)

Scroggins adds in his affidavit (Pleading No. 21):

> 3. I was present when Paul E. Cox conducted a hypnotic session with Cathy Sells (now Cathy Burns) on September 21, 1982. Both officer Cox and myself talked with and obtained the *approval* of chief deputy prosecuting attorney, Richard Reed, before hypnotizing Cathy Sells on September 21, 1982. (Emphasis added.)

This permission was necessary to excuse Cox's horrendous misuse of forensic hypnosis. Cox was instructed in his three-day seminar:

> PERSONS NOT TO BE HYPNOTIZED
> No suspect or potential suspect in any criminal matter will be considered for hypnosis sessions. (Pl. Exhibit 28).

Cathy Burns was helpless. With no one to protect her rights, Cathy was the primary target of their investigation and Reed was authorizing this unlawful intrusion into her privacy.

The use of forensic hypnosis is unequivocally investigative. Officer Scroggins relayed to Reed the serious reservations they had because of Cox's training (R. 37, 84, 101, 102).

The reservations are mirrored in professional journals and legal texts:

> Declarations made under hypnosis have been treated judicially in a manner similar to drug-induced statements. The hypnotized person is ultrasuggestible, and this manifestly endangers the reliability of his statements. The courts have recognized to some extent the usefulness of hypnosis, as an investigative technique and in diagnosis and therapy. However, they have rejected confessions induced thereby, statements made under hypnosis when offered by the subject in his own behalf, and opinion as to mental state based on hypnotic examination.

McCormick, Law of Evidence, § 208 at 510 (2nd ed. 1972) (footnotes omitted).

Numerous criminal cases and professional treatises warn of the misuse of forensic hypnosis. (See bibliography of cases and authorities attached to Pleading No. 9, Ex. D.)

Reed need not have become an investigator. The police were liable and paid a judgment for their wrongful conduct; no policy argument excuses Reed, and this advances the intended purpose of 42 U.S.C. § 1983. Cathy Burns urges this Court to hold Reed and those police officers to the same standard for the same wrongdoing.

2. REED'S DECISION TO APPROVE A WARRANTLESS ARREST WAS INVESTIGATORY.

Under Indiana Statutory Law, the prosecutor has the same arrest powers as a police officer (I.C. 35-33-1-1 and 35-41-1-17; Pet. App., 24a). Reed was as much a decision-maker to the arrest of Cathy Burns as Officers Cox and Scroggins. There were no exigent circumstances that would require an immediate,



warrantless arrest. Reed was gatekeeper to Burns' liberty. He was the one responsible, according to Officer Scroggins, as the ultimate decision-maker for detention (R. 107-08, 116). If the arrest is found to be unlawful or is in violation of the constitutional rights of Burns, Reed should suffer the same risks of liability as a police officer in similar circumstances under 42 U.S.C. § 1983.

The testimony of Cox and Scroggins indicated that after the hypnosis of Cathy Burns, there was a review of the videotape by Reed and at some point following that, a discussion on whether or not they had enough evidence to arrest her. Scroggins and Cox both indicated that they asked Reed what he thought and his reply could have been considered an opinion or could have been characterized as a joint decision to arrest. As already mentioned, Reed had the power to arrest under Indiana law.

Along with the power to arrest, he may be liable under state law for false arrest. Indiana's provision on the subject, commonly referred to as the Indiana Tort Claims Act, sets forth the governmental limits of liability at I.C. 34-4-16.5-3, which reads in pertinent part as follows:

> **Immunity from liability.**—A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from:
>
> * * *
>
> (7)The adoption and enforcement of or failure to adopt or enforce a law . . . , *unless the act of enforcement constitutes false arrest or false imprisonment*. (Emphasis added.)

In this particular case, Cox, Scroggins and Reed chose to effect a warrantless arrest without the benefit of an impartial magistrate to weigh objectively the evidence that might support probable cause. It is just such abuses which are prohibited by the Fourth Amendment and which do not comport with the limiting protections enunciated in *Imbler*. The Fourth Circuit, for example, has held unequivocally that making an arrest is a police function, not a judicial one, *Weathers v. Ebert*, 505 F.2d 514, 517 (4th Cir. 1974) *cert. denied*, 424 U.S. 975, 96 S.Ct. 1480 (1976).

Whether or not an arrest is effected and by whom may be a question for the jury: "An arrest is the taking of a person into custody so that he may be held to answer for a crime." I.C. 35-33-1-5 and *King vs. City of Fort Wayne*, 590 F.Supp. 411 (N.D. Ind. 1984). An arrest is made by actual restraint of the person or by his submission to the custody of the officer. See I.C. 35-33-1-1. An officer does not necessarily need to tell the accused that he or she is under arrest when the circumstances make it clear that the officers are intending to arrest the accused and an announcement of such would be idle ceremony. See *Pullins v. State*, 253 Ind. 644, 256 N.E.2d 553 (1970). Burns would reiterate that Reed was critically involved in the joint decision and the arrest of Cathy Burns. The arrest would not have been made were it not for Reed's giving permission (R. 116). There were not exigent circumstances. The failure of Reed the following day to inform the court as to the circumstances which allowed the police officers to interpret Burns' testimony under hypnosis as a confession, suggest that Reed willfully acted to subvert the Fourth Amendment provisions which would have protected Cathy Burns from a false arrest. This conduct should not be protected by either absolute immunity or qualified immunity.

3. REED'S PRESENTING FALSE AND DECEPTIVE INFORMATION AT A PROBABLE CAUSE HEARING IN WHICH HE SOUGHT A SEARCH WARRANT WAS INVESTIGATIVE.

Burns respectfully directs the Court to read carefully the transcript of the testimony between Prosecutor Reed and Officer Scroggins which is found in the Appendix to the Petition For Writ of Certiorari. This type of fraud on a court should never be protected by absolute immunity when it precedes the filing of formal criminal charges. In the case of *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974), the Court of Appeals denied absolute immunity to a prosecutor who had assisted in obtaining a search warrant based upon perjured testimony. In the instant case, it was Reed who actually testified, eliciting from Scroggins only confirmation of information which rather specifically alluded to the interrogation under hypnosis the previous day. It was not an oversight, as Reed contends, that he forgot to mention it to the judge; Cathy Burns would prefer to argue that point to the jury and allow the jury to decide the question.



The seeking of a search warrant before formal charges are filed under false pretenses has to be viewed as investigative. The Seventh Circuit's reliance on *Imbler* is misplaced and its summary r[illegible]ion of petitioner's argument in a footnote hardly seems consiste[illegible] with the common law and historical policy considerations [illegible]scussed at length in *Imbler* and many other circuit cases.

This lack of evidence may be one explanation why Reed chose not to file formal criminal charges, contrary to state law, until eight days after the warrantless arrest. Here again, in the affidavit there was no mention of the fact that the information elicited from Cathy Burns, which the officers interpreted as a confession, was obtained exclusively under hypnosis.

Burns would urge the Court to reject any arguments which would allow this conduct to fall within the pale of absolute immunity as prescribed in *Imbler*. This also seems consistent with the Fifth Circuit's holding in *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) *cert. denied*, 450 U.S. 913 (1981):

> [A] prosecutor who assists, directs or otherwise participates with the police in obtaining evidence prior to indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacity . . .

625 F.2d at 505. The dishonest conduct of Reed and Scroggins deserves equal application under 42 U.S.C. § 1983.

C. DISCIPLINARY ACTION AND CRIMINAL PROSECUTION FOR PROSECUTORIAL MISCONDUCT ARE NONEXISTENT AS AN ALTERNATIVE CHECK ON REED'S ACTIONS.

Cathy Burns sought simultaneously redress from the Indiana Disciplinary Commission for the deceitful actions of Reed on obtaining a search warrant while her civil case was pending. It was summarily rejected without investigation. This single episode would prove nothing but for the fact that since 1975, there are no reported cases of prosecutorial discipline or criminal prosecution for perjury or related misconduct.[12]

This is consistent with available reports on the subject matter.

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[12]There are cases of prosecutors being charged for fraud or theft.

> Another sanction that could be employed and would be entirely personal to the prosecutor is disciplinary action through a bar association committee. Such sanction has been invoked, but its imposition is so rare as to make its use virtually a nullity . . . . With the exception of a handful of cases . . .effective disciplinary action is an illusion. [Footnotes omitted.]

Bennett L. Gershman, Prosecutorial Misconduct, § 1.8(d) 1989.

*Imbler* asserted that absolute immunity would not leave the public powerless to deter and punish misconduct. 424 U.S. 409, 428-429. The Court pointed to the criminal law, citing 18 U.S.C. Section 242 and Cal. Penal Code Section 217 (1970), and to professional discipline as adequate checks on prosecutorial abuse. *Butz*, too, made reference to the professional obligations of advocates. 438 U.S. 478, 512. But the idea that EC 7-13 or the ABA Standards are effective deterrents to overzealous conduct is simply not supported by the evidence.

Cal. Penal Code Section 127 makes anyone guilty of the subornation of perjury punishable as if he were personally guilty of perjury. It does not deal directly with attorneys, and a review of California cases failed to turn up a single instance of this statute's use against a prosecutor. The case cited in *Imbler*, p. 29, *In re Branch*, involved a state-appointed defense attorney and not a prosecutor (and he was found innocent). Research of cases under 18 U.S.C. § 242 failed to identify any case involving a prosecutor. *Imbler's* reliance on the criminal law as a deterrent to prosecutorial misconduct seems misplaced.

Two commentators have described the problem in the title of their published article. See Edward M. Genson and Marc W. Martin, *The Epidemic Of Prosecutorial Courtroom Misconduct In Illinois: Is It Time To Start Prosecuting The Prosecutor?* 19 Loyola University Law Journal 39, 57.

Evidence of professional disciplinary actions for prosecutors does not recommend this sanction as a deterrent. Some jurisdictions have even expressed doubt about the applicability of the ABA Code of Professional Responsibility to prosecutors. Alabama and Pennsylvania have refused to let the bar impose professional discipline on prosecutors. *Simpson v. Alabama*, 311 So. 2d 307 (Ala. 1975); *Snyder's Case*, 301 Pa. 276 (1980). This



stands in marked contrast to the *Imbler* court's assertion that prosecutors stand unique in their amenability to professional discipline. Furthermore, a survey of appellate cases dealing with all types of prosecutorial misconduct shows that a sizeable number, perhaps a majority, related to a prosecutor's nonadvocate functions. Steele, *Unethical Prosecutors And Inadequate Discipline*, 38 Southwestern Law Journal 965, 970. See Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney*, 10 A.L.R. 4th 605 (1981).

The evidence says that advocacy-related misconduct is going unpunished to an even larger degree—and yet this is precisely the kind of activity to which the court has extended absolute immunity, at least in part on the basis of the possibility of professional discipline. See Steele and Alschuler, *Courtroom Misconduct by Prosecutors and Trial* . . . 50 Texas L. Rev. 629 (1972). Reed's conduct was investigative; there is no advocacy nor is discipline likely.

## II.

## JURIES SHOULD BE THE FINAL ARBITERS OF QUESTIONS OF FACT WHEN PROSECUTORIAL CONDUCT AND THE INTEGRITY AND VERACITY OF WITNESSES DO NOT DEFINE THE ISSUE OF IMMUNITY PURELY AS A MATTER OF LAW

The Supreme Court has consistently found support in the common law and in its contemporary fashioning of public policy to clothe prosecutors with absolute immunity for conduct which is intimately associated with the bringing of criminal charges and presenting the State's case. But the nuances of motive, the plausibility or justification of the acts, and the demeanor of witnesses cannot be conveyed in briefs opposing motions to dismiss or summary judgments. Only a jury viewing the witnesses or the parties can apply common sense in partnership with common law instructions. Without a bright line test to guide the court in its pre-trial motion rulings, the question of involvement in police investigatory actions is best left to the jury. Immunity was not intended to allow wrong-doers to escape their deeds.

Alexis de Tocqueville spent approximately nine months in the United States in 1831 and 1832, and yet wrote extensively

about his impressions of democracy and the evolving experiment which attempted to control the tyranny of the majority and yet allow freedom for individuals. His commentary on the American jury system is worth reading again. It is an institution for public policy.

> *** The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.
>
> ***
>
> The institution of the jury consequently invests the people, or that class of citizens, with the direction of society *** The jury cannot fail to exercise a powerful influence upon the national character *** The jury *** serves to communicate the spirit of the judges to the minds of all the citizens; and the spirit, with the habits which attend it, is the soundest preparation for free institutions. ***[13]

These sentiments, although the observation of a European, express the ideals of the nineteenth century as well as the twentieth century. The judgment of one's peers, who take into account their everyday experiences and understandings of human nature, and who speak the public interest by their verdict was removed by the trial court and taken away from Cathy Burns.

To illustrate the difficulty of forcing these issues into a strictly legal mold, compare the initial opinion of the trial court based upon the depositions, affidavits and other evidence. The court wrote in its entry dated May 1, 1987:

> 'When determining which type of immunity a government official enjoys, we look to the nature of the function that the official was performing in the particular case.' *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986). Because Defendant Reed could not recall vital incidents of the investigation, specifically recalled by officers Cox and Scroggins, material issues of fact remain as to Reeds possible investigative activities herein *** In the alternative Defendant Reed claims the defense of qualified immunity. Reed is not entitled to qualified immunity because of his activities with Defendants Cox and Scroggins in regards to the probable cause hearings.[14]

Burns maintains that the record made during the trial was even stronger than the allegations in the complaint. What was left, of course, was for Reed to attempt to explain his conduct, qualify his actions and excuse his participation in what would otherwise be viewed as investigatory conduct. These subtle nuances should have been decided upon and weighed by a jury as opposed to a judge. Burns is at a loss to find what it was that the judge saw in the testimony or heard from the witnesses, which under *Mitchell v. Forsyth*, was so clearly a legal question as to preclude the jury when he initially thought it was a fact question.

Other appellate courts have had the same dilemma. In the case of *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988) the court stated:

> We do not agree that applying to the Court for a wiretap warrant is clearly a prosecutorial function. Further factual inquiry is necessary to determine whether the functions Arcara and Quinlan performed entitled them to absolute immunity. Even if they are not entitled to absolute immunity, they may be entitled to qualified immunity if their actions were objectively reasonable under clearly established law. (Citations omitted).

850 F.2d at 77.

The Court went on to add that based upon the allegations in the complaint the parties were not entitled to absolute immunity,

---

[13] See Democracy In America, Alexis de Tocqueville, Richard D. Heffner, The New American Library, 1956, p. 127-128.

[14] Found in the record as Pleading No. 40a.

nor was their conduct objectively reasonable under clearly established law entitling them to qualified immunity.

The First Circuit, in the case of *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974), denied absolute immunity to a prosecutor who had assisted in obtaining a search warrant based upon perjured testimony. In the case of *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), the Ninth Circuit reversed the Trial Court's motion to dismiss and stated:

> Given the limited factual record at this point in the proceedings it does not appear beyond doubt that the plaintiffs will be unable to prove that the prosecutors were engaging in police-type investigative work.

867 F.2d at 1204.

Here again the court required further development of the facts which would support the contentions of the plaintiffs Gobel and DeFranco. In the view of Burns, prosecutors can simply put forth any self-serving statement to justify or explain how their actions aided them in determining whether or not to initiate formal criminal charges. It must be reiterated that there is no prohibition against prosecutors doing any of these things. It is only when the plaintiff makes out a prima facie case that the arrest or search was unlawful under the Fourth, Fifth or Fourteenth Amendments, does the question of scrutinizing the prosecutor's conduct become significant.

The Seventh Circuit seems tentative about whether juries should be responsible:

> [1]Who decides the immunity question when facts pertinent to it are in dispute--judge or jury? See *McGaugher v. City of Chicago*, 664 F.Supp. 1131, 1139 (N.D.Ill.1987). The cases in this circuit go both ways, but our most recent and only en banc decision on the question states that the judge should always decide the issue of immunity. See *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. 1988). That is what was done here, without objection by either party.

*Jones v. City of Chicago*, 850 F.2d 985 (7th Cir. 1988).



In the instant case, the jury had heard testimony supporting a series of separate investigative activities of Prosecutor Reed. They further viewed word for word the testimony of the Hearing For Probable Cause. Burns can find no persuasive public policy reason or legal argument to take such a decision away from the jury when the witnesses' veracity is already in question.

The Sixth Circuit, in the case of *Joseph v. Patterson*, was asked to determine whether or not the defendant's alleged interrogation of a witness is insulated activity under *Imbler* and subject to dismissal under *Mithcell, supra*. The court stated:

> Because there are allegations which could support a finding that Thompson acted in an investigative capacity during the interview, we conclude that summary disposition was inappropriate. Remand is necessary for further development of the record on this issue before the District Court can properly determine the nature and intent of the interview and whether absolute immunity should insulate Thompson from liability for this alleged act.

795 F.2d at 555.

This further example of determining a prosecutor's motive or intent is a very subjective one best left to a jury to view the witness and weigh his testimony in reaching a final determination of liability.

Burns is particularly persuaded by the reasoning of the Fifth Circuit in the *Marrero* case, which was handed down after *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978) and *Owen v. City of Independence*, 438 U.S. 902 (1980). The Court outlined its principles in deciding the issues, and those principles give considerable deference to the jury process:

> Since § 1983 by its very terms admits of no immunities, but rather imposes liability upon "every person" who, under color of state law, deprives another of his civil rights, courts are naturally loath to clothe any person with an immunity which would frustrate the statutes' design of providing

> vindication to those wronged by the misuse of state power *** Hence, immunities are extended to government officials only when "overriding consideration of public policy nonetheless [d]emand that the official be given a measure of protection from personal liability and "to ensure his ability to function effectively" *** Moreover, even when a measure of protection is given to an official, the policy in favor of protecting the individual's right to compensation normally mandates that qualified immunity be granted *** Thus, only in "exceptional situations" do the special functions of an official require the protection of an absolute shield from liability. (Citations omitted)

*Marrero*, 625 F.2d at 503.

Thus Burns argues that the trial court erred in granting defendant's motion for a directed verdict and interfered with the proper constitutional function of the jury. On appeal, the Seventh Circuit was obliged to review the record and ruling of the trial court based upon the same principles of Rule 51 of the Federal Rules of Civil Procedure. See *Appleman v. United States*, 338 F.2d 729 (7th Cir. 1964), *cert. denied*, 380 U.S. 956 (1964). If there are questions of fact, as Burns maintains, then all reasonable inferences must be allowed to the non-moving party and the evidence must be viewed in the light most favorable to the party opposing the motion. These standards, when applied to the record established in the trial of *Burns v. Reed*, even in light of the functional approach set forth in *Imbler*, recommend that this matter should have been sent to the jury. See *Kole v. Chrysler Corp.*, 661 F.2d 1137, 1140 (7th Cir. 1981).

Burns found further support for her argument in the case of *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979). In this case the Seventh Circuit was asked to review the trial court's decision granting a directed verdict to the defendants. The court opinioned:

> [A] motion for directed verdict must be denied when the evidence reveals that reasonable persons 'in a fair and impartial



> exercise of their judgment may draw a different conclusion therefrom'.

600 F.2d at 607-08.

Almost all of the cases cited in Burns' brief which accuse prosecutors of extra-judicial conduct involve more than one act which allegedly falls outside the protection of absolute immunity. It is those successive acts which give credence and weight to Burns' argument that the prosecutor was not acting judicially but rather as a police officer. He involved himself by coming down to the detective's headquarters after working hours and viewing the videotape of Burns' hypnosis, conferring with the officers about whether or not there was probable cause and whether they should arrest her, conferring about where she should be held pending the filing of formal charges, conferring about whether or not to make public the circumstances which led to the "solving of the crime." Each of these acts taken alone may be more difficult to defend as an investigatory action on the part of Reed. Taken collectively, this particular sequence demonstrates a continuing involvement in police investigative function, including participation in obtaining a search warrant under false pretenses. Burns can only speculate on the motives, but it is quite possible that the police and Reed felt that she would confess under the post-hypnotic suggestion or from the public pressure, and they probably hoped there would be some incriminating evidence directly linking her to the crime. But none of that happened. She did not confess, she maintained her innocence, and they continued to misrepresent to the court in seeking a warrant for her arrest by failing to mention that she had denied any responsibility before the hypnosis and continued to deny any responsibility after the hypnosis. The affidavit in support of her arrest was not offered into evidence to demonstrate a separate theory of liability against Reed and Stonebraker, but rather to demonstrate a continuity of duplicity in the wrongful arrest of Burns and the consequential taking of her children by civil court authorities.

The functional analysis by the trial court in ruling upon the motion for a directed verdict removed the issue from the jury because of its definition of Reed's conduct. While definition is necessary to control the scope of the argument, if the definition is made by such broad strokes of language that the result is confusion then the deduction is based on a false premise. Here, too, in *Burns*, the overly broad definition of "advice" came to

include giving permission to hypnotize, joining in a mutual decision to arrest, a collective decision to keep the hypnosis from public knowledge, and seeking a search warrant, all this conduct prior to filing criminal charges. If all of these activities had occurred among police officers, there is no doubt that these pre-trial activities would be regarded as investigative.

The First Amendment right to petition government for redress which includes access to the courts, supports as well, Burns' arguments against absolute immunity: the citizen has the right to petition the court; yet if the court preemptorily dismisses such claims for reason of prosecutorial immunity, such a right of redress is, in effect, voided by a foregone conclusion.

Burns believes that reasonable persons could differ as to the nature, characterization of the activities in which Reed was engaged, and it should have been left to the jury to decide these subjective issues. Burns believes that had the jury been allowed to deliberate, weigh the evidence and hear arguments of counsel, that Burns' rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution would have resonated to those ideals of justice and fairness and the remedies of 42 U.S.C. § 1983.



## CONCLUSION

For all of these reasons, the Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals for the Seventh Circuit and the decision of the District Court and hold that the actions of Rick Reed are not protected by absolute immunity and that the District Court erred by granting Respondent's motion for a directed verdict.

Respectfully submitted,

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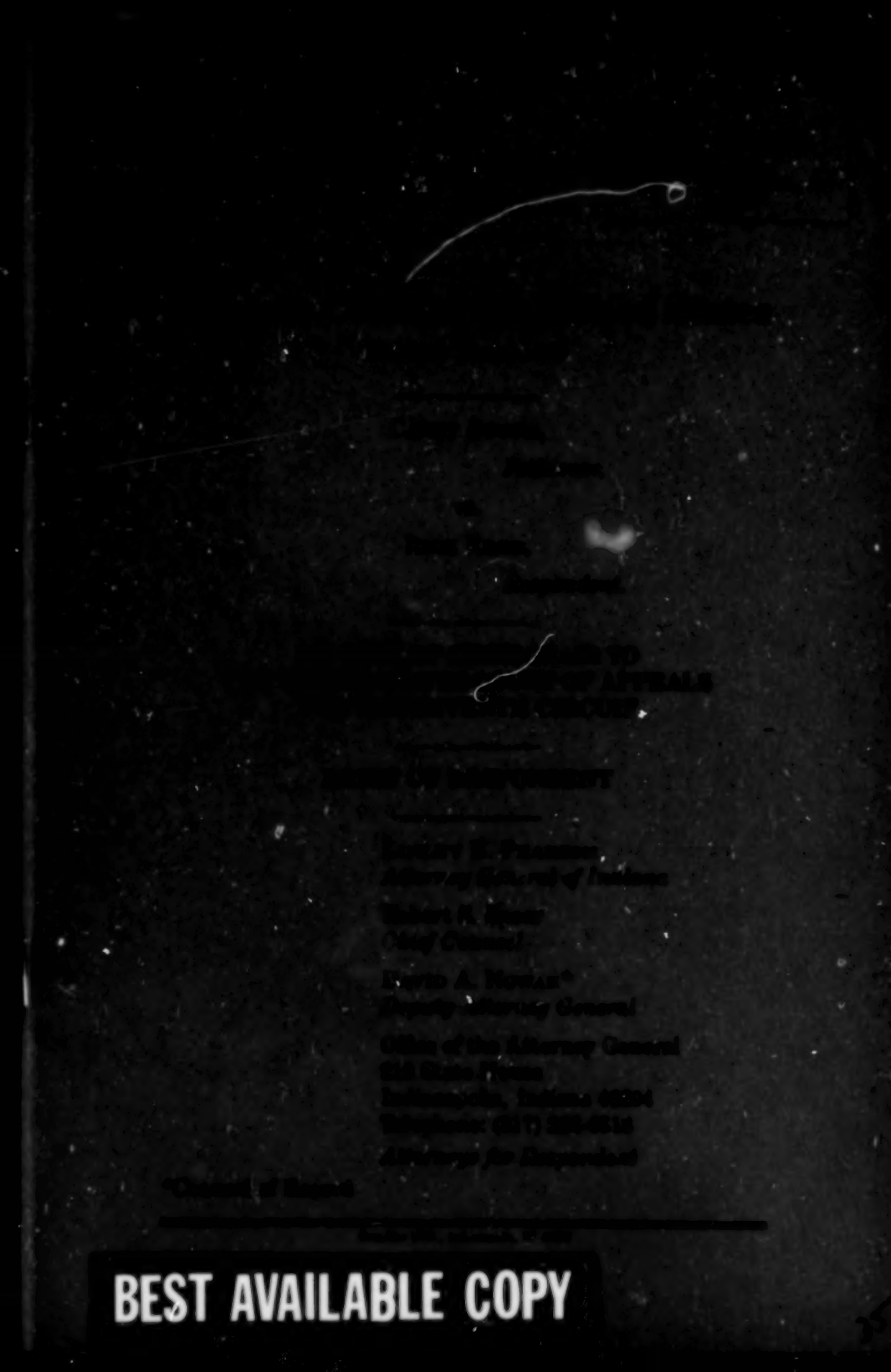

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No. 89-1715

IN THE

# Supreme Court of the United States

October Term, 1990

CATHY BURNS,

*Petitioner,*

vs.

RICK REED,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF OF RESPONDENT

The Respondent, Deputy Prosecuting Attorney Rick Reed (hereinafter Reed), respectfully prays that the Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit), which affirmed the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter District Court).

## STATEMENT OF THE CASE

The question presented herein is purely legal. Both the District Court and the Seventh Circuit found that the only actions taken by Reed were to provide legal advice to police officers and to present the state's case to a state court judge during a hearing on an application for a search warrant. The only issue raised is whether such conduct is protected by the doctrine of absolute immunity.

On September 2, 1982, the Petitioner, Cathy Burns (hereinafter Burns), reported to police officers that an unknown person had entered her home, shot her sons and attacked her with a blunt instrument (Transcript157-158). Muncie Police Officers Cox and Scroggins conducted the investigation of this crime (T.22).

After a period of time, the police officers formed the opinion that Burns was the prime suspect in the shooting (T. 75). Even though the police were informed that Burns had failed a polygraph examination and a voice stress test, they lacked probable cause to arrest her (T. 75). On September 21, 1982, Burns was interrogated and verbally threatened by police officers (T.66, 164-167). Cox and Scroggins then decided to place Burns under hypnosis. Up to this point, Reed had no contact with or involvement in the police investigation (T.65-66, 111).

Reed's first involvement was on the afternoon of September 21, 1982 when Officer Scroggins made a telephone call to Reed (T.66). Officer Cox explained the reason for the phone call as follows:

> Q. And what was the conversation that you heard even though it was one-sided?
>
> A. The extent of the conversation was that we were at the time contemplating a hypnosis session with Cathy and that we wanted him to give us his opinion on whether or not we should do that. At that particular time, I think Mr. Reed was also a police liaison attorney as far as the police department was concerned. I can't say



> the exact words, but I indicated to Don to explain to him that we were aware of the fact that hypnosis of suspects may not be admissible as far as criminal proceedings were concerned; and we did advise him that she had indicated to us she wanted to do that and we wanted to know from him whether or not he felt we should proceed.
>
> * * *
>
> Q. What is your recollection about being told by Mr. Scroggins of Mr. Reed's response?
>
> A. Mr. Scroggins indicated to me that Mr. Reed indicated to us if we had no other avenue to explore, we might as well do that.

(T.101-102.)

Officer Scroggins testified as to the reason for the phone call as follows:

> A. I said that Cox and I had determined that we felt like she was the only one that could provide us additional information of the investigation and that we wanted to hypnotize her; but Cox had advised me that her being a possible suspect, that in his training, he was told that you do not hypnotize suspects.
>
> * * *
>
> Q. What did you tell Mr. Reed about Cathy Sells status as a suspect?
>
> A. The conversation with Reed was brief. It was mostly just to advise him of the point we were at in the investigation and the request from him for permission to hypnotize her.
>
> Q. What was Mr. Reed's response?
>
> A. He said for us to go ahead.

(T.37, 67.)

Reed did not recall the telephone conversation in question,

nor does he dispute the police officer's testimony concerning the telephone conversation (T.125, 127). It is undisputed that Reed was not informed of any of the details of the case, such as: that Burns had failed a polygraph and voice stress test, how long she had been at the police station, that she had become ill while at the police station, that police officers had threatened her, or that she had been deprived of lunch (T.66-67).

Other than advising the police officers to proceed with the hypnotic session, there is no evidence to indicate that Reed was involved with the hypnotic session or the investigation leading up to the session. Reed in no way instructed the officers on how to proceed with the hypnotic session (T.113). Shortly after the hypnotic session, Officers Scroggins and Campbell arrested Burns (T.67-69, 72, 114).

Either during the hypnotic session or shortly thereafter, Reed received a phone call requesting that he come to the police station to give some advice on the Burns case (T.125-126). Reed recalled the reason for his attendance at the police station as follows:

> Generally, I arrived at the detective headquarters. The only person I recall speaking to was Dr. Ken Joy. When I arrived, he was already there. But he began to tell me about what was going on. I didn't recall speaking to Officer Cox or Scroggins or any of the other officers.
>
> I do recall seeing them there. I asked Dr. Joy what was going on. He proceeded to tell me about this hypnosis session that he had either witnessed or viewed a tape of. I asked him some questions about it; in response to which he told me that what he had seen gave him cold chills; that he thought it was quite possible we had a real case of split personality and this was a person who needed to be in the hospital and not in jail.
>
> Somebody — I think it was Dr. Joy — asked me if that was possible if she could go to the hospital instead of jail. I gave my opinion that could be done.

(T.130-131.)



Officer Cox described the reason for Reed's presence at the police station and the advice given as follows:

> Q. Did Mr. Reed participate in the decision to arrest Cathy at that time based upon the information you had supposedly obtained from her under hypnosis?
>
> A. The extent of his participation was my explaining to him what we had developed as a result of the hypnotic session and asking if he felt like we had probable cause to make that arrest. It was decided during the discussion, of course, to — that she would not be kept in the Delaware County Jail; that she would be taken to Ball Memorial Hospital. And, in fact, in order for us to take her to the hospital and have her committed to the psychiatric floor for examination we had to have an official police hold put on her which was the arrest.
>
> Q. When you asked Mr. Reed of his opinion about probable cause, what was his response?
>
> A. Mr. Reed indicated that we probably had probable cause for the arrest.

(T.107-108; see also, T.115.)

Officer Scroggins described Burns' arrest and Reed's involvement in the arrest as follows:

> A. I told her we were going to arrest her at that point.
>
> Q. Prior to that time though, excluding the telephone conversation with Mr. Reed, did you discuss with Mr. Reed the decision to arrest Cathy Sells [Burns]?
>
> A. No. That's not the policy. We arrest people. The police department arrests people. And the prosecutor's office is the one that actually files the formal charge.
>
> Q. Is it a practice — my next question is is it a practice for you to consult with the prosecutor's department or office before you arrest an individual?
>
> A. No.

Q. And you did not do so in this case?

A. No.

* * *

Q. Did you and Mr. Reed and anyone else you can think of engage in a discussion about whether or not to arrest Cathy?

A. I was in the room. And Marvin Campbell had come in the room. And they were the ones that actually arrested Cathy and advised her that she was being placed under arrest.

Q. So the decision to arrest, if it took place, you don't recall whether Mr. Reed was part of that or you didn't hear him being part of that?

A. No, I didn't hear. The only involvement that I can recall Mr. Reed being involved in was after we had filled out the arrest sheet on Cathy. Then we went into the hallway. And Mr. Reed and Dr. Joy, Captain Cox, and Deputy Chief Bodkin was there. And the decision was made then whether to take her to the hospital rather than take her to jail. . . .

(T.69, 38-39.)

The day following Burns' arrest, Reed and Officer Scroggins appeared before the trial court and obtained a search warrant for the search of Burns' residences. In Indiana, a prosecutor's presence is not necessary for a police officer to obtain a search warrant. Ind. Code §33-35-5-1 *et. seq.* However, the state court trial judge testified before the District Court that, in her court, the presence of a prosecutor was necessary and that it would not be possible for a police officer to obtain a search warrant on his own (T. 5).

The trial judge was not informed of the fact that Burns' only confession, which formed the probable cause for the warrant, was obtained through the use of a hypnotic session. Burns made no other confession. In explaining the omission of this fact from the evidence, Reed stated:



> My testimony is that when I was questioning Lieutenant Scroggins in front of Judge Cole, I was under the assumption that he had interviewed her and gotten a confession from her. We are not talking about the hypnosis session. I knew about that. I had been there the following evening.

(T.136.)

Reed testified that he was under the impression that Burns had confessed in an interview other than the hypnotic session. He was provided this incorrect information from another individual, thought to be Michael Alexander (T.134-140, 147-148). Other then his in-court participation in obtaining the search warrant, Reed had no other involvement in the search (T.121).

There was no evidence in the District Court that Reed either participated in a decision or instructed the police officers in question to conceal the fact that the confession was obtained from a hypnotic session. Officer Scroggins, who testified at the search warrant hearing, testified in the District Court that he had no prior discussion with Reed concerning his testimony and was never instructed by Reed not to talk about hypnosis (T.50-51; see also T. 46, 48, 137). None of the witnesses indicated that there was an attempt to conceal the fact that the confession was obtained pursuant to a hypnotic session (T.109, 133).

Eight days later, an information was filed thereby initiating a prosecution against Burns and an arrest warrant was obtained (T.11-12). It is undisputed that the affidavit of probable cause which supported the issuance of the arrest warrant made no reference to the fact that Burns' confession was obtained pursuant to hypnosis.

There is absolutely no evidence in the record that Reed made any statements to the press. In fact, the contrary is true (T.51, 110, 130, 147).

After a week of trial and at the conclusion of Burns' case, the District Court granted Reed's motion for a directed verdict. The District Court found that the evidence established that Reed's only involvement in the case was to render legal advice

to police officers, to represent the government in a state court proceeding concerning an application for a search warrant, and to initiate a criminal prosecution. Pursuant to this evidence, the District Court held that Reed was entitled to absolute immunity for his activities. (Petition Appendix, page 15a.) The Seventh Circuit affirmed the District Court's decision. (Petition Appendix, page 1a.)

## SUMMARY OF THE ARGUMENT

A prosecutor's function of rendering legal advice to police officers and appearing before a trial court to seek a search warrant are quasi-judicial functions which must be protected by absolute immunity from civil liability.

Both the District Court and the Seventh Circuit found that the only functions Reed performed were to render legal advice to police officers and to appear before a state trial court as the government's attorney to elicit testimony in support of an application for a search warrant. These factual determinations are not subject to review by this Court.

The function of rendering legal advice to police officers is a quasi-judicial function which must be protected by absolute immunity to free the judicial process from harassment or intimidation and to accomplish the desired objective of the stricter and fairer enforcement of the laws. Public policy mandates that the police be able to obtain legal advice concerning investigative techniques they are about to perform so they will not be in a position where they must make their best guess as to what a suspect's rights are. The prosecutor, as the government's attorney, is trained to give legal advice to police officers and he must be able to do so to properly fulfill the duties of his office. The denial of absolute immunity would discourage, if not prevent, communication between police officers and the prosecutor, thereby hampering the stricter and fairer enforcement of the laws, one of the central goals of the criminal justice system.



The function of appearing before the trial court as the government's attorney and eliciting testimony in support of an application for a search warrant is also a quasi-judicial function deserving the protections of absolute immunity. It is preferable that the government's attorney be involved in this process, as he can evaluate the evidence and determine whether probable cause exists for the issuance of the search warrant and then assist the detached magistrate in the probable cause determination. Such a function is a vital part of the judicial process which must be protected by absolute immunity. If absolute immunity were not afforded, prosecutors would not participate in such proceedings, to the detriment of the criminal justice system.

This Court has determined that the question of whether immunity applies is a question of law to be decided by the District Court. In this case, there were no facts in dispute which would establish that Reed engaged in any investigative function and therefore the District Court properly determined that Reed was entitled to the protections of absolute immunity. Since there were no disputed facts, the jury properly played no role in the determination of the immunity question.

## ARGUMENT

### I.

### DEPUTY PROSECUTOR REED'S CONDUCT WAS NOT INVESTIGATIVE, BUT QUASI-JUDICIAL, IN THAT IT WAS LIMITED TO RENDERING LEGAL ADVICE AND APPEARING BEFORE THE COURT AS THE GOVERNMENT'S ATTORNEY

In *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), this Court held "that in initiating a prosecution and in presenting a State's case, the prosecution is [absolutely] immune from a civil suit for damages under [42 U.S.C.] § 1983." The Court recognized that not all activities of a prosecutor would be protected by the grant of absolute immunity. If a prosecutor engages in investi-

gative activities, he is entitled to a qualified immunity or a "good faith defense comparable to the policeman." *Id.*, at 430. However, activities of a prosecutor which are an "integral part of the judicial process" are to be afforded the protection of absolute immunity. *Id.*

Reed does not dispute the foregoing legal conclusions nor does he attempt to argue that investigative activities should be protected by absolute immunity. Reed agrees that when he engages in conduct comparable to that of a police officer he is protected only by qualified immunity. In this case, there is no evidence that Reed engaged in any conduct comparable to that of a police officer. He did not participate in any interrogation or hypnotic session of Burns, he conducted no investigation of Burns, nor did he arrest Burns. The police officers in question engaged in such conduct. Reed's conduct in this case was limited to rendering legal advice to police officers and appearing before a state trial court to obtain a search warrant; these are functions of an Indiana prosecuting attorney in a criminal case.

The District Court found as a fact that Reed's conduct was limited to rendering legal advice and appearing before a state trial court as follows:

> When we began this case, there were four areas in which the defendant was charged with violating the constitutional rights of the plaintiff. One was that he authorized this hypnosis. Another was that he participated in the arrest without a warrant and in obtaining a search warrant without probable cause and that he defamed or slandered the plaintiff after she was released by making certain statements to the newspapers.
>
> According to the *Henderson* case [*Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986)], a prosecuting attorney or deputy prosecuting attorney has absolute immunity when what he does is done in a quasi-judicial role. I am sure there is no dispute about that fact as established in *Imbler v. Pachtman*, the Supreme Court case.
>
> The question is whether he is operating in a quasi-



> judicial role. The *Henderson* case, which is a Seventh Circuit interpretation of *Imbler v. Pachtman* to some extent at least, even though it doesn't mention it, sets up certain criteria for determining whether or not the prosecuting attorney is acting in a quasi-judicial role. And it says flat out that giving advice, legal advice, is operating or acting in a quasi-judicial role.
>
> Now, the testimony in this case about the Defendant Reed is both the police officers — Cox and the other officer, Scroggins — agree that they called Reed on the phone at his home. Well, his home is immaterial. But, anyway, they called him on the phone and asked if it would be proper or permissible to hypnotize the plaintiff. And he said yes.
>
> I don't think there is any question that is giving legal advice. He didn't initiate it. He didn't suggest it. According to his testimony, which is the only positive testimony on the subject, he was home cutting his yard or something. At least he was home when the call came. So he was giving legal advice.
>
> On the seeking of the arrest without a warrant, there is a conflict in the evidence as to whether the plaintiff was arrested before or after someone talked to Mr. Reed. But the evidence that someone did talk to Mr. Reed was simply that the police officer asked Reed if in his opinion there was probable cause for the arrest of the plaintiff; to which the response was yes. There again, that's calling for a legal opinion which he gave. He says he was under the impression there was a separate confession other than on the tape or on the hypnotic session which, of course, there was not. But that's beside the point. The question was is there probable cause to arrest this lady. And he said yes, I think so. That's a legal opinion.
>
> Finally as to getting the search warrant, you can characterize the proceeding before the judge as testimony by Mr. Reed. And if he asked leading questions — and I think he did — why, of course, you can say that. But the fact is that it was a proceeding in court before a judge. No matter

what the form of the question was, the person seeking the search warrant and doing the testifying was the police officer. And what Mr. Reed was doing was doing his job as a deputy prosecuting attorney and presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties.

The fourth phase was publicity. There is no evidence at all on that.

(T. 219-223; Petition Appendix, page 15a-16a.)

Before the Seventh Circuit, Burns argued that the District Court erred in finding that Reed's activities were limited to rendering legal advice. The Seventh Circuit rejected Burns' argument as follows:

> The remaining question is whether Reed merely gave legal advice to Officers Cox and Scroggins or whether he participated in the investigation. The officers testified that they called Reed at his home to seek his advice about the propriety of their intentions to hypnotize and question the appellant. Officer Cox testified that they called Reed because he was the police liaison for the Prosecutor's office. Both officers emphasized that they were seeking Reed's legal opinion about their proposed course of action. Based on the foregoing testimony, it is apparent that Reed was rendering legal advice to the officers and should be immune from suit, even if he did render unsound advice.

*Burns v. Reed*, 894 F.2d 949, 956 (7th Cir. 1990), Petition Appendix, page 13a.

Nevertheless, Burns persists in her unsupported argument that Reed directed the investigation, was otherwise involved in the investigation, and acted as a police officer. In effect, Burns asks this Court to reweigh the evidence and come to a conclusion contrary to that of the two lower courts.

Federal Rule of Civil Procedure 52(a) enjoins appellate courts from weighing facts unless the determinations of the lower courts were clearly erroneous. Traditionally, this Court



has accorded great weight to a finding of fact which has been made by a district court and approved by a court of appeals. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n. 15 (1984), citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). As this Court stated in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987):

> The Court of Appeals did not set aside any of the District Court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task. Nothing the Unions have submitted indicates that we should do so. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1978). See also *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). Unless there are two or more errors of law inhering in the judgment below, as the Unions claim there are, we should affirm it.

Therefore, the question before this Court is not whether Reed engaged in investigative functions, but whether Reed's activities of rendering legal advice and appearing before a state trial court are quasi-judicial functions protected by absolute immunity. Reed's conduct can be broken down into four basic components.

First, Reed advised the police officers that they could hypnotize Burns. Burns claims that such advice violated her constitutional rights, yet she has not cited to this Court, or any of the lower courts, one case holding that a voluntary hypnosis violates a suspect's constitutional rights. Obviously, police conduct in obtaining consent to or in conducting the hypnosis may violate constitutional rights, but Reed had no involvement in or knowledge of these events. Since there was no clearly established law at the time of the events herein, and there presently is no clearly established law, which holds that Burns' constitu-

tional rights were violated due to the mere fact that she was hypnotized, the doctrine of qualified immunity as announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), would have protected Reed absent the District Court's finding of absolute immunity.

Second, Reed advised the police officers that there was probable cause to arrest Burns on the basis of the hypnotic testimony. Once again, Burns has failed to establish that an arrest on the basis of hypnotic testimony cannot form the basis for probable cause to arrest an individual and is therefore unconstitutional. Subsequent to Burns' arrest, the Indiana Supreme Court ruled that evidence obtained through the use of hypnosis can be used to establish probable cause for the arrest of an individual. *Gentry v. State*, 471 N.E.2d 263 (Ind. 1984). Thus, Burns seeks to recover for Reed's act of giving what turned out to be correct legal advice. In any event, the doctrine of qualified immunity would have protected Reed absent the District Court's finding of absolute immunity.

Third, Reed presented evidence before a state court judge and obtained a search warrant. It is undisputed that the evidence submitted failed to indicate that the only confession in the case was the result of hypnosis. The parties disagree as to whether the failure to inform the court that the confession was a result of hypnosis was a mistake or an intentional act, but this distinction is irrelevant if Reed's function of appearing before a trial court is afforded absolute immunity. This Court has recognized that absolute immunity must be afforded to prosecutors irrespective of their intent.

> We conclude that the considerations outlined above dictate the same absolute immunity under §1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would deserve the broader public interest. It would prevent the vigorous and



> fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

*Imbler v. Pachtman*, 424 U.S.409, 425-426 (1976), citing *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). The Court specifically held that absolute immunity would apply to allegations that a prosecutor willfully suppressed exculpatory information. *Id.*, at 411 n. 34. Thus, the Court is not confronted with a question of fact as to Reed's motives but rather the Court is presented with the strictly legal question of whether absolute immunity protects the function of a prosecutor appearing before a trial court as the government's attorney and presenting evidence in support of an application for a search warrant. This question will be argued in Part III, *infra*.

Burns also disputes that any activity on Reed's part in obtaining the arrest warrant is protected by the doctrine of absolute immunity. To the extent that this issue has been raised, it must be noted that in Indiana an arrest warrant can only be obtained either after an indictment from a grand jury has been obtained, or after the prosecuting attorney has filed an information. Ind. Code §35-33-2-1(c). Therefore, any such conduct on Reed's part would surely be within *Imbler's* grant of absolute immunity since it is conduct occurring after the initiation of the prosecution and is part of the presentation of the state's case.

Fourth, Burns argues that Reed made statements to the press which allegedly violated Burns' constitutional rights. Burns has failed to refer this Court or the courts below to any evidence in the record which would indicate that Reed made such comments to the press. The District Court expressly found that there was no evidence of comments to the press. (Petition Appendix, page 15a.)

## II.

## A PROSECUTOR'S FUNCTION OF RENDERING LEGAL ADVICE TO POLICE OFFICERS IS A QUASI-JUDICIAL ACT ENTITLED TO THE PROTECTION OF ABSOLUTE IMMUNITY

In Indiana, a prosecuting attorney is a judicial officer whose position is created by the Indiana Constitution. As such, common law mandated that he be entitled to absolute immunity for his conduct. The Indiana Supreme Court has described the role of the prosecutor and the immunity to which he is entitled as follows:

> He (a prosecuting attorney) is a judicial officer, created by the constitution of the state. . . . He is the law officer to whom is entrusted all prosecutions for felonies and misdemeanors. . . . He is the legal advisor to the grand jury. We think he is an officer entrusted with the administration of justice. The prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court. The rule applicable to such an officer is thus stated by the eminent author: "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however malicious the motive which produced it." Townsh. Sland. & L. (3d Ed.) § 227, pp. 395,396.

*Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). The Indiana Supreme Court more recently concluded that common law provided prosecutors with immunity for all activities within the general scope of the authority given to prosecuting attorneys, including their duty to make statements to the press and inform the public of the activities of their office. *Foster v. Pearcy*, 387 N.E.2d 446, 449 (Ind. 1979).



Of course, 42 U.S.C. §1983 does not facially establish any immunities. However, this Court has consistently read the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). In *Tower v. Glover*, 467 U.S. 914 (1984), this Court held that if an official can point to a common law counterpart for the immunity that he asserts, then he is entitled to immunity against a §1983 action unless the history and purposes of §1983 counsel against the provision of immunity. *Id.*, at 920. Unlike the police officers in *Malley v. Briggs*, 475 U.S. 335 (1986), Reed can point to the immunity available at common law and argue that it should apply to the quasi-judicial acts he performed herein.

This Court interpreted §1983 to give absolute immunity to *functions* "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). As this Court explained in *Briscoe v. LaHue*, 460 U.S. 325, 334-335 (1983), the immunity is not given to protect individuals who perform functions nor to shield individuals from liability, but because any lesser degree of immunity for the function itself could impair the judicial process. Therefore, it is the function that the individual is performing, not the fact that an individual holds a particular office or position, which results in the granting or denial of absolute immunity. This approach was recently explained as follows:

> Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified immunity"

> that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

*Forrester v. White*, 484 U.S. 219, 224 (1988), citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Butz v. Economou*, 438 U.S. 478 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Stump v. Sparkman*, 435 U.S. 349 (1978).

This Court also explained its long-standing view that individuals other than the judges or prosecutors may be entitled to absolute immunity, depending upon the function that they perform. For example, this Court explained:

> In the years since *Bradley* was decided, this Court has not been quick to find that federal legislation was meant to diminish the traditional common law protections extended to the judicial process. *See, e.g., Pierson v. Ray*, 386 U.S. 547 (1967). On the contrary, these protections have been held to extend to executive branch officials who perform quasi-judicial functions, see *Butz v. Economou*, *supra*, 438 U.S., at 513-514, or who perform prosecutorial functions that are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The common law's rational for these decisions - freeing the judicial process of harassment or intimidation - has been thought to require absolute immunity even for advocates or witnesses. See *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Butz v. Economou*, *supra*, 438 U.S., at 512.

*Forrester v. White*, 484 U.S. 219, 225-226 (1988).

Therefore, prosecutorial immunity protects not only the specific activities presented in *Imbler*, but also extends to all other functions which are quasi-judicial in nature. Such quasi-judicial functions must be afforded absolute immunity in order to free the judicial process from harassment or intimidation.

The prosecutor's conduct in this case amounted to nothing more than rendering a legal opinion that it would be permissible to hypnotize Burns. The Seventh Circuit found that the function of rendering a legal opinion to police officers was



similar to the everyday work of lawyers and judges and was therefore quasi-judicial. *Burns v. Reed*, 894 F.2d 949, 954 (7th Cir. 1990), citing *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *Citizen Energy Coalition of Indiana, Inc. v. Sendak*, 594 F.2d 1158 (7th Cir. 1979), *cert. denied*, 444 U.S. 842 (1980). In rendering legal advice, the prosecutor performs a function similar to that of a judge. Both a prosecutor and a judge review the facts of a given case, then render an opinion concerning legality. *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986).

Reed's advice that probable cause existed for Burns' arrest amounted to even more than a quasi-judicial legal opinion; in assessing probable cause, the prosecutor is also making a decision concerning the initiation of the state's case. The decision that probable cause exists for an arrest is part and parcel of the larger process of initiating a prosecution and therefore is entitled to immunity pursuant to *Imbler*. *Marx v. Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987). See also, *Imbler v. Pachtman*, 424 U.S. 409, 423 n. 20 (1976). It must be noted that this rationale has not been accepted by all of the circuit court of appeals. *Compare, Wolfenbarger v. Williams*, 826 F.2d 930 (10th Cir. 1987); *Benavidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983).

However, the determination that Reed's conduct was a quasi-judicial function does not end the analysis. The immunity should only attach to the quasi-judicial act if the immunity is necessary to free "the judicial process from harassment or intimidation." *Forrester v. White*, 484 U.S. 219, 226 (1988). This concern was recognized in *Imbler* as follows:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the

possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows:

"The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move for dismissal of the case . . . The apprehension of such consequences would tend toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer enforcement." *Pearson v Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (1935).

*Imbler v. Pachtman*, 424 U.S. 409, 423-424 (1976).

The Seventh Circuit approached this concern by citing the three factors listed in *Butz v. Economou*, 438 U.S. 478 (1978) to determine whether absolute immunity should apply.

> First, we examine the historical or common-law basis for the immunity in question. Second, we examine whether the function which the official performs subjects him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to retaliate the underlying conflict and charg[e] the participants in the first with unconstitutional animus. And third, we consider whether the official is subject to checks upon abuses of authority, such as correction of error on appeal.

*Burns v. Reed*, 894 F.2d 949, 954 n. 4 (7th Cir. 1990).



The application of all of these tests mandates the conclusion that the function of giving legal advice to police officers is a function deserving of absolute immunity. The immunity of a prosecutor was recognized at common law. Secondly, the immunity will free the judicial process of harassment or intimidation, will avoid numerous lawsuits against prosecutors and will accomplish the objective of stricter and fairer enforcement of the laws.

The unfettered ability of prosecuting attorneys, city attorneys, county attorneys and state attorneys general to freely advise police officers is of paramount public concern. Such an ability provides police officers with guidance on what conduct is permissible in a given case, thereby making the legal system fairer. If a police officer is unable to ask for legal advice, he may well unknowingly violate a citizen's constitutional rights. In the instant case, had there been a prohibition against hypnotizing Burns, the police officers could have avoided the violation by asking for such advice. Furthermore, it would be quite impossible for a prosecutor to effectively perform the duties of his office without being able to contact the police and advise police officers on legal matters. The failure of police officers to follow the law can and will jeopardize any prosecution. A prosecutor must, therefore, render legal advice to assure effective prosecution of criminals; such conduct should be encouraged. To subject a prosecutor to §1983 liability without the cloak of immunity for the rendering of legal advice would surely diminish the effectiveness of a prosecutor and the overall fairness and quality of the judicial system.

The fear of vexatious litigation could, and in fact would, discourage prosecutors from rendering any legal advice to police officers; that in turn could seriously hamper the state's ability to effectively prosecute criminals. Furthermore, the absence of immunity would affect every criminal prosecution. Even a visit to a police station by a prosecutor could be construed as an investigative act by the prosecutor. Even if the prosecutor simply renders legal advice, will criminal defense

attorneys respond by filing civil litigation in response to the indictment or information? Will releases from civil litigation routinely become part of the plea bargaining process or part of the stipulation of dismissal for the criminal charge? To deny absolute immunity for the act of rendering legal advice simply opens the prosecutor and the criminal process to unlimited challenges from criminal defendants. That is exactly what has happened in this case. Reed had a telephone conversation and visited the police station during which time he rendered legal advice. As a result, Burns argues that Reed's right to absolute immunity should be forfeited. If a telephone call from a police officer or a simple visit to a police station for the sole purpose of rendering legal advice can result in the loss of absolute immunity, can we ever expect a prosecutor to visit the police station for any purpose? Can we realistically expect a prosecutor to have any contact with the police concerning a case prior to the obtaining of a indictment or the filing of an information? The fair and effective prosecution of criminals mandates cooperation between law enforcement officers and government attorneys. Adoption of the position advocated by Burns herein and the denial of absolute immunity for the rendering of legal advice will destroy all cooperation between the police and prosecutors and thereby hamper the criminal justice system. Qualified immunity is appropriate when the prosecutor acts and functions as a police officer. However, absolute immunity is required when a prosecutor acts as the government's attorney and renders a legal opinion to police officers.

The Seventh Circuit accurately described the consequences of the denial of absolute immunity for the prosecutor's function of rendering legal advice as follows:

> We have little doubt that a prosecutor's risk of becoming entangled in litigation based on his or her role as a legal advisor to police officer is as likely as the risks associated with initiating and prosecuting a case. As the present case illustrates, police officers do turn to a prosecutor when they are uncertain about the legality of a possible investigative technique. And this is as it should be. We do not



> hesitate to recognize that the decision at hand should be guided, in part, by sound policy considerations. With that in mind, it is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisors, the end result would be to discourage prosecutors from fulfilling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques, and the possibility that their proposed conduct will violate the rights of their suspects.

*Burns v. Reed*, 894 F.2d 949, 955-956 (7th Cir. 1990).

Reed also has the burden of establishing that absolute, and not qualified immunity, is "justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 224 (1988). In this case, as explained *supra*, Reed would have been protected by the doctrine of qualified immunity for his advice that it was proper to use hypnotic testimony as a basis for the probable cause determination. However, if it is assumed that the law was then clearly established that hypnotic testimony could not be used to support a probable cause determination, the doctrine of qualified immunity would have afforded Reed no protection irrespective of any other aspect of the case. Qualified immunity would not protect a prosecutor if he renders a legal opinion on the basis of erroneous information obtained from police officers or, as in the instant case, when the prosecutor was acting under the mistaken impression that a confession other then the hypnotic confession was obtained. Qualified immunity would not protect the prosecutor from simple acts of negligence in the rendering of legal advice.

Qualified immunity only protects a prosecutor when the law is not clearly established and the prosecutor proceeds to render an opinion on what the law should be. Such an inadequate

protection for the function of rendering legal advice violates the reasoning of this Court in *Imbler.* Qualified immunity would not protect a prosecutor from unfounded litigation which would cause a deflection of the prosecutor's energies from his public duties. *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). In fact, the provision of qualified immunity would generate more lawsuits. If it can be assumed that in most situations a prosecutor will render proper legal advice, advice in accordance with currently established law, a prosecutor can be sued in every instance when he acted properly, and qualified immunity will not terminate the lawsuit at the outset. A prosecutor will have to proceed with the litigation and establish that his advice was proper under the facts of the given case or that the advice was based upon erronous information received from police officers. Denial of absolute immunity will leave the prosecutor, who rendered proper legal advice, without any immunity protections. Under such circumstances, the public cannot expect the office of the prosecutor to be administered with courage and independence, *Id.*, at 423, because a prosecutor could be sued any time he renders legal advice; only the prosecutor who renders an opinion on a matter where the law was not clearly established would be entitled to the protection of qualified immunity. Absolute immunity is the only protection which will adequately protect a prosecutor when he fulfills this important function and is the only protection which encourages and fosters the spirit of cooperation that the public deserves between the government's attorney and police agencies.

An Indiana prosecuting attorney, a constitutional judicial officer in the same sense as a judge, entrusted with the administration of justice, *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896), should be afforded absolute immunity for those functions necessary to the proper operation of the prosecutor's office. A prosecutor must fulfill his or her obligation as the government's attorney in criminal proceedings. Reed maintains that the function of providing legal advice to police officers is a quasi-judicial act which deserves the protections of absolute immunity. Contrary to Burns' assertions, such conduct is not comparable to that of a police officer, for it is hard to imagine how a police officer without a law degree would generally be competent to render a complex legal opinion. The prosecutor, the government's attorney, is the individual who possesses the skill and abilities to perform this function. These men and women are charged with the responsibility of representing the state, assuring the proper conviction of the guilty and the exoneration of the innocent. To fulfill this duty, it is entirely proper and necessary that prosecutors render legal advice so as to insure stricter and fairer enforcement of the law. The government's attorney does not perform functions comparable to that of a police officer, unless he actually becomes involved in the investigation. For example, in this case, if Reed had been involved in the actual hypnosis of Burns, that would be investigative. If such conduct on Reed's part had been established, then, and only then, would Reed have forfeited his entitlement to absolute immunity. But as long as the prosecutor's function is limited to the rendering of legal advice, a quasi-judicial act, public policy requires the protections of absolute immunity.



## III.

## A PROSECUTOR'S FUNCTION OF APPEARING BEFORE A TRIAL COURT AND PRESENTING EVIDENCE IN SUPPORT OF AN APPLICATION FOR A SEARCH WARRANT IS ENTITLED TO THE PROTECTION OF ABSOLUTE IMMUNITY.

On September 22, 1982, the day after the hypnotic session, Chief Deputy Prosecuting Attorney Reed arrived at work and was asked by the Prosecuting Attorney, Michael Alexander, to go to court and assist a police officer from the Muncie Police Department in an attempt to get a search warrant (T. 134). Reed had no prior discussion with the police officers concerning the application for the search warrant (T. 137). He reviewed several police reports and obtained information from Alexander, his superior, concerning what information was available

(T.134-137). Reed then proceeded to court and, as the government's attorney, elicited testimony from Officer Scroggins in support of the application for a search warrant. A transcript of this hearing can be found in the Petition Appendix, pages 19a-22a. There is absolutely no evidence that Reed had any prior contact with the police concerning whether a search warrant could be obtained. There was no evidence that Reed discussed the situation with the police prior to the hearing. There is no evidence that Reed had any further involvement in the events surrounding the search warrant. He did not participate in the search in any way. The only function Reed performed was to appear in open court and act as the government's attorney. He questioned a witness as to the factual basis for the application for the search warrant.

It is undisputed that the trial court was not informed that the confession from Burns, which formed the sole basis for the search warrant, was obtained as a result of a hypnotic session. Reed explained that he was under the mistaken impression that there was a second confession which was obtained in the absence of a hypnotic session and that he obtained this erroneous information from Michael Alexander (T. 134-136). Burns argues, without evidentiary support, that Reed intentionally lied to or misled the state trial court so as to assure the issuance of the search warrant. Any dispute as to the motives of the prosecutor or the reason for the failure to provide the trial court with allegedly relevant information, is simply irrelevant. *Imbler v. Pachtman*, 424 U.S., at 425-6, citing *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). What is relevant to this discussion is whether the act of appearing before a trial court as the state's lawyer and advocate is a quasi-judicial function protected by absolute immunity.

In Indiana, a prosecutor's presence is not necessary for a police officer to obtain a search warrant. Ind. Code §33-35-5-1 *et. seq*. However, the state court trial judge testified before the District Court that, in her court, the presence of a prosecutor was necessary and that it would not be possible for a police



officer to obtain a search warrant on his own (T. 5). The evidence needed to support an application for a search warrant may be made by affidavit, or pursuant to testimony presented in open court, as was done in the instant case. When eliciting testimony in this cause, Reed acted as the government's attorney and asked questions of Officer Scroggins. It is undisputed that only an attorney or the judge can ask questions in an Indiana court. Reed was not sworn as a witness nor did he testify. His sole function was to act as the government's attorney and present the state's case.

As discussed *supra*, in determining whether absolute immunity should attach, this Court looks to the function involved. In the instant case, the function was that of an officer of the court presenting evidence in support of the state's case. This is the very conduct which the *Imbler* court held was protected by the doctrine of absolute immunity.

Furthermore, it is obvious that Reed's conduct was quasi-judicial, in that Reed was acting as an attorney while appearing before the trial court. It is also an act that deserves the protections of absolute immunity. It is preferable that the government's attorney be involved in this process in order to make the enforcement of criminal laws fairer and stricter. An attorney can evaluate the evidence and determine whether probable cause exists for the issuance of the warrant. The attorney can then assist the detached magistrate in the probable cause determination. Under such circumstances, the attorney is not performing a function comparable to that of a police officer, who gathers the evidence necessary to obtain the warrant, then testifies to said facts. The attorney is performing a quasi-judicial function in that he evaluates the evidence and presents the state's case.

Absolute immunity for such functions is necessary to shield the judicial system from harassment and intimidation and the lawsuits that would surely be filed if absolute immunity is lost for such functions. Without absolute immunity, all prosecutors would be subject to civil litigation whenever they have partici-

pated in a search warrant proceeding. Under such circumstances, a prosecutor who is not judgment proof would logically refrain from offering any advice to police officers concerning an application for a search warrant and would refuse to participate in the judicial warrant application procedure. The end result would be the absence of cooperation between the police and the prosecutor's office prior to the filing of criminal charges, to the detriment of all citizens, the police, and the prosecutor's ability to effectively prosecute criminals. In addition, every time a defense attorney in a subsequent criminal prosecution filed a motion to suppress the evidence obtained from a search, would it not also be prudent for him to file a civil action against the prosecutor? Once again, the prosecutor would be put in the position of obtaining a release from civil liability along with any plea bargain or stipulation of dismissal of the criminal charges. Such harassment and intimidation of the criminal justice system cannot be tolerated if the public expects a prosecutor to effectively and fearlessly perform his or her duties.

Reed does not argue that he is entitled to absolute immunity when he acts as a police officer and collects evidence to support a search warrant, signs an affidavit, testifies to facts necessary to support a search warrant, or participates in the execution of the search warrant. But when the only activity of the prosecutor is to appear before the state trial court and present evidence in support of the search warrant, the case law cited *supra* demands the protections afforded by the doctrine of absolute immunity.

## IV.

## THE ISSUE OF WHETHER DEPUTY PROSECUTOR REED WAS ENTITLED TO THE PROTECTION OF ABSOLUTE IMMUNITY IS A QUESTION OF LAW TO BE DETERMINED BY THE COURT AND NOT A JURY

In *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976), the Court recognized that the purpose of absolute immunity was to defeat a lawsuit at the outset. The immunity is from suit, not



just from damages. A judge, as a matter of law, should find that the wrongful conduct alleged is within the scope of the immunity and dismiss the cause without further proceedings.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized that immunity, whether absolute or qualified, is a question of law for the trial court to decide. *Id.*, at 818-819. This was reiterated in *Mitchell v. Forsyth*, 472 U.S. 511, 527 n.9 (1985), where the Court emphasized that the determination of whether a defendant is entitled to immunity is a question of law for the court to decide. *Accord*, *Rakovich v. Wade*, 850 F.2d 1180, 1201-1202 (7th Cir. 1988) (en banc).

Burns argues that the jury should have decided the issue of whether Reed was entitled to absolute immunity. She argues that the jury should have been allowed to judge Reed's motive and intent, and his explanation for the conduct that he engaged in. Brief of Petitioner, at 25-32. What Burns fails to recognize is that motive or intent is not relevant to the immunity analysis. This Court recognized that absolute immunity must be afforded to prosecutors irrespective of their intent or motives. *Imbler v. Pachtman*, 424 U.S., at 425-6, citing, *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001, 1002 (Ind. 1896). This holding was confirmed in *Harlow v. Fitzgerald*, supra, when this Court held that the subjective intent of a government official was irrelevant even to the qualified immunity issue. *Id.*, at 816-817. What is relevant is for the District Court to determine whether Reed's acts were quasi-judicial in nature. If the trial judge answers the question in the affirmative, then absolute immunity applies; judgment for the prosecutor must be entered irrespective of his intent or motive.

In the instant case, the District Court denied pre-trial motions grounded on absolute immunity based on concerns that there were questions of material fact as to Reed's actions. After a week of trial, at the conclusion of Burns' case, the evidence established that Reed functioned only as the government's attorney and was performing only quasi-judicial functions. Absolute immunity was therefore appropriate; judgment

was entered for Reed. This result is consistent with this Court's opinion in *Anderson v. Creighton*, 483 U.S. 635 (1987), where the Court recognized that trial courts would not always be able to determine whether immunity should apply on the basis of the pleadings alone. Therefore, this Court stated:

> Noting that no discovery has yet taken place, the Creightons renew their argument that, whatever the appropriate qualified immunity standard, some discovery would be required before Anderson's summary judgment motion could be granted. We think the matter somewhat more complicated. One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U.S., at 817 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. *Id.*, at 818. See also *Mitchell, supra*, 472 U.S., at 526. Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

*Id.*, 646, n 6.

This Court's prior decisions direct the District Court to determine whether immunity applies as early as possible in the legal proceeding, preferably prior to the commencement of discovery. There is no principled distinction that supports Burn's argument that the jury must make the factual determination of whether immunity applies if the case proceeds to trial. What Burns argues, in effect, is that the District Court can never direct a verdict even though the evidence indisputably supports the granting of immunity. Of course, if the evidence is disputed as to whether a prosecutor performed functions comparable to that of a police officer, then the District Court must allow the cause to go to a properly instructed jury who could find liability only if they find that the prosecutor engaged in an investigative function. There was no such disputed evidence in this case which would mandate the imposition of such a procedure.



In the instant unusual case, discovery and the filing of dispositive motions did not resolve all questions concerning exactly what functions Reed performed in the Burns case. A trial was necessary. After all of Burns' evidence was introduced, it was clear that Reed's only participation in the Burns case was to perform quasi-judicial functions. The District Court then properly made its findings of fact concerning immunity and entered judgment on Reed's behalf. No error was committed. The District Court followed every existing precedent of this Court that absolute immunity is a question of law for the judge, not the jury.

## CONCLUSION

For all of the foregoing reasons, it is respectfully urged that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit and the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division.

Respectfully submitted,

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(7)

No. 89-1715



# In the Supreme Court of the United States

OCTOBER TERM, 1990

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CATHY BURNS, PETITIONER

*v.*

RICK REED

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity from suit for damages under 42 U.S.C. 1983 for giving legal advice to police officers about the conduct of their investigation and for later eliciting testimony during a probable cause hearing to obtain a search warrant.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1715

CATHY BURNS, PETITIONER

*v.*

RICK REED

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case presents a question this Court reserved in *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.33 (1976): whether a prosecutor has absolute immunity from suit for damages under 42 U.S.C. 1983 for giving legal advice to police officers about the conduct of their investigation and for later eliciting testimony during a probable cause hearing to obtain a search warrant. Although federal officers are not subject to suit under Section 1983 for constitutional violations, there is an implied right of action against them for violations of constitutional rights, see, *e.g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and this Court has stated that the scope of immunity available to federal officers in such an action is generally the same as that available to state officials sued under Section 1983. See *Harlow* v.

*Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). The United States thus has a direct and substantial interest in the Court's resolution of the question presented. The disposition of this case is likely to have a significant effect on the liability of federal prosecutors sued for damages as a result of actions taken in the performance of their official duties.

## STATEMENT

1. On September 2, 1982, petitioner reported that an individual had entered her home in Muncie, Indiana, knocked her unconscious, and then shot and wounded her two children. During their investigation, Muncie police officers Paul Cox and Donald Scroggins determined that petitioner herself was "their prime suspect" in connection with the incident, Pet. App. 2a, even though she had no difficulties with polygraph and voice stress examinations, provided exculpatory handwriting exemplars, and held to her story during repeated interviews. Cox and Scroggins apparently believed that petitioner was a "multiple personality." *Ibid.*

Cox and Scroggins decided to interview petitioner under hypnosis. On September 21, 1982, Scroggins telephoned respondent Rick Reed, the Chief Deputy Prosecutor for Delaware County, at his home and asked him about the propriety of such an interview.[1] After hearing that petitioner was the officers' principal suspect and that she alone could provide "additional information" about the crime, respondent told Scroggins that he should proceed with the interview as planned. Pet. App. 2a-3a.

Cox and Scroggins then obtained petitioner's consent and hypnotized her at the police station. During the interview, petitioner described the intruder and identified her as "Katie." She also referred to herself as

[1] Respondent was the "police liaison attorney" between the police department and the county prosecutor's office. Pet. App. 2a. Respondent had no prior involvement in the officers' investigation. Tr. 65, 111.



"Katie," and the officers interpreted that reference as supporting their theory that petitioner had committed the crime and that she suffered from a personality disorder.[2] Once taken out of hypnosis, petitioner again told the officers that she had had nothing to do with the crime. Pet. App. 3a.

Cox and Scroggins decided to keep petitioner in custody and sought respondent's advice about whether there was probable cause to arrest her. Respondent met the officers at the police station on the night of September 21. Officer Cox "explain[ed] to him what [the officers] had developed as a result of the hypnotic session and ask[ed] if he felt like we had probable cause to * * * arrest [petitioner]." Tr. 107. Respondent told the officers that they "probably had probable cause for the arrest." Tr. 108. As a result, the officers placed petitioner under arrest.[3]

The following day, September 22, respondent, accompanied by Officer Scroggins, appeared before a county court judge to obtain a warrant to search petitioner's home.[4] Under respondent's questioning, Scroggins testified at the probable cause hearing that petitioner, during the September 21 interview, had confessed to shooting her children. Neither Scroggins nor respondent explained the peculiar circumstances of the interview, *i.e.*, that peti-

[2] The officers recorded the interview on videotape. According to petitioner, that tape shows that Officer Cox gave petitioner a "post-hypnotic suggestion * * * that [she] would not remember the hypnosis but would cooperate fully with the police in their investigation." Pet. 3; see Pet. Br. 4. Moreover, according to the district court, the officers had "conned [petitioner] into submitting to hypnosis, and then suggested a number of things to her when she gave answers that they didn't like." Pet. App. 16a.

[3] Petitioner was later taken to a state hospital, where she spent four months in a psychiatric ward. During that stay, medical and psychological experts concluded that petitioner did not suffer from a personality disorder. Pet. App. 4a.

[4] Respondent had been instructed to assist the police in procuring the search warrant. Tr. 134-135.

tioner had been hypnotized. As a result of Scroggins' testimony, the judge issued the search warrant. Pet. App. 3a, 19a-22a.

On September 28, the county court judge issued a formal warrant for petitioner's arrest on charges of attempted murder. The court issued that warrant based on the affidavit of Jack Stonebraker, an investigator for the Delaware County Prosecuting Attorney. That affidavit recounted petitioner's alleged confession, but, like Scroggins' earlier testimony, did not mention the circumstances of the interview. Pet. 3a-4a.

Petitioner was charged under Indiana law with attempting to murder her two children and was ordered to stand trial.[5] Before trial, petitioner filed a motion to suppress the statements given under hypnosis. The state trial court granted that motion. Since those statements apparently were the linchpin of the State's case, the Delaware County Prosecuting Attorney's Office dismissed all criminal charges against petitioner. Pet. App. 4a.

2. In January 1985, petitioner filed a federal court action against respondent, Scroggins, Cox, Stonebraker, the Muncie Police Department, and other Muncie police officials. With respect to respondent, petitioner claimed that his approving the police officers' request to interview her under hypnosis, participating in her arrest, and later eliciting misleading testimony about that interview during the probable cause hearing violated her constitutional

[5] As a result of petitioner's confinement to the psychiatric ward, state authorities sought and obtained temporary custody of her two children. After the criminal charges were dismissed, petitioner's older child was returned to petitioner's custody in 1986; as a result of his father's demands, the younger child evidently has not been allowed to live with petitioner. See Pet. 4; Pet. Br. 5-6.

Petitioner also lost her job as a radio dispatcher for the Muncie Police Department as a result of this episode. She was unable to regain that position after the criminal charges were dismissed. Pet. 4-5; Pet. Br. 6.



rights. Compl. ¶ 47; see *id.* ¶¶ 1, 32.[6] Petitioner sought compensatory and punitive damages. *Id.* ¶ 47.

Before trial, respondent filed a motion for summary judgment, contending that he was entitled to absolute immunity from liability in damages for his conduct as a prosecutor.[7] The court denied that motion, finding that, on the record presented to date, it was not clear whether respondent's alleged conduct fell within the scope of his prosecutorial duties. The court thus concluded that there were genuine issues of material fact that warranted proceeding to trial. Pet. App. 5a.[8]

After presentation of petitioner's case, the district court granted respondent's motion for a directed verdict, holding that Reed was absolutely immune from suit for "giving legal advice and presenting a matter in court." Pet. App. 17a. The court found that respondent's ap-

[6] Petitioner also claimed that respondent defamed her by stating publicly, after the charges were dismissed, that he continued to believe she was responsible for the crime. Compl. ¶ 46. Since petitioner presented no evidence on that claim the district court granted respondent's motion for a directed verdict. Pet. App. 16a. Petitioner sought no further review of that claim.

[7] Respondent had also filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6). The district court denied that motion, concluding that petitioner had alleged violations of federally protected constitutional rights and that she had raised claims that principles of absolute and qualified immunity did not necessarily bar. Order 7-9, *Burns* v. *Cox*, No. IP 85-155-C (S.D. Ind. Feb. 25, 1986).

In his motion for summary judgment, respondent argued in the alternative that he was entitled to qualified immunity. The district court denied that claim, concluding that respondent's failure to make known to the county court judge all the pertinent facts in the course of applying for the search warrant may have violated clearly established federal law. Order 6-8, 10, *Burns* v. *Cox*, No. IP 85-155-C (S.D. Ind. May 1, 1987).

[8] The court also denied the motions for summary judgment filed by Scroggins, Cox, and Stonebraker. As a result, those defendants settled with petitioner and agreed to pay her a total of $250,001. Pet. 2; Pet. App. 5a. The district court later dismissed petitioner's claims against all defendants except respondent. See Pet. 2.

proval of the officers' request to interview petitioner under hypnosis amounted to "giving legal advice." *Id.* at 15a. With respect to respondent's statement to the officers that they had probable cause to arrest petitioner, the court similarly found that this advice was his "legal opinion." *Id.* at 16a. Finally, with respect to respondent's participation in the judicial hearing, the court found that he "was doing his job as a deputy prosecuting attorney in presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-14a. It stated that, under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the scope of absolute immunity accorded to a prosecutor's conduct required consideration of three factors: (1) whether there is a historical or common law basis for the asserted immunity; (2) whether the official's actions subject him to the risk of vexatious litigation; and (3) whether there are safeguards against the official's abuse of his authority. Pet. App. 9a & n.4.

Turning to that analysis, the court admitted that its

> review of the historical or commonlaw [*sic*] basis for the immunity in question does not yield any direct support for the conclusion that a prosecutor's immunity from suit extends to the act of giving legal advice to police officers.

Pet. App. 11a. Borrowing from Indiana common law, however, the court determined that "the dispositive question is whether the conduct of the prosecutor is of a judicial nature and requires the prosecutor to exercise analogous judgment." *Id.* at 11a-12a. Here, the court found that when a prosecutor provides legal advice to police, he does "function[] in a manner similar to both [his] role as a prosecutor and to that of a judge." *Id.* at 12a.

With respect to the second factor—the risk of vexatious litigation—the court had "little doubt that a prosecutor's risk of becoming entangled in litigation based on his or



her role as a legal advisor to police officer[s] is as likely as the risks associated with initiating [a] prosecution." Pet. App. 12a. Finally, the court found that there were "sufficient checks upon the prosecutor to prevent abuses of the authority to render legal opinions free from liability." *Id.* at 13a. The court pointed to the judicial process itself, the electorate, and professional disciplinary rules. Accordingly, the court held that "a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct." *Ibid.*[9]

On the record presented, the court found it "apparent that [respondent] was rendering legal advice to the officers." Pet. App. 13a.[10] The court therefore held that he was entitled to absolute immunty from suit.[11]

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[9] The court made clear, however, that "a prosecutor steps outside of his * * * quasi-judicial role when he * * * actually participates in investigative conduct * * * [and that] such conduct is not accorded absolute immunity." Pet. App. 13a.

[10] The court, in a brief footnote, rejected petitioner's contention that respondent's "act of presenting evidence before the county judge in the probable cause hearings was part of the investigative stage of the case." Pet. App. 11a n.6. The court held that, under *Imbler* v. *Pachtman*, 424 U.S. at 431, respondent was absolutely immune from suit for such conduct taken "in initiating a prosecution and in presenting the state's case." Pet. App. 11a n.6.

[11] Judge Ripple filed a short concurring opinion, emphasizing that the court had held only that "a prosecutor enjoys absolute immunity with respect to *legal advice* given to law enforcement officers * * * [and did] not hold that such absolute immunity necessarily extends to situations in which the prosecutor goes beyond rendering legal advice and assumes responsibility for the management of the investigation." Pet. App. 14a.

## SUMMARY OF ARGUMENT

A. The scope of absolute immunity for the performance of prosecutorial functions should be determined by the need to protect those functions that directly affect the fairness and integrity of the judicial process. As this Court recognized in *Imbler* v. *Pachtman*, harassment of a prosecutor by unfounded litigation could divert his energies, cause him to lose his independence of judgment, and thus have an adverse effect on the functioning of the criminal justice system. Even those prosecutorial activities that occur at the investigative stage, and that aid in the investigation, may require the protection of absolute immunity if they are "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. at 430.

In light of those principles, the inquiry in each case should be whether the threat of a damages action will unduly chill the exercise of the prosecutor's judgment and, if so, whether the fairness and integrity of the judicial process itself is also threatened. Also relevant to the inquiry are the insights afforded by consideration of practices and precedents at common law, and the existence of available alternatives to a damages remedy for the correction and deterrence of official misconduct. Under this framework, the activities challenged here warrant absolute immunity from suit.

B. When a prosecutor provides legal advice to police officers in connection with an investigation, the advice is integral to, and in furtherance of, his core functions of screening cases for formal presentment and of safeguarding the fairness of the criminal justice process. The fact that such advice occurs at the investigative stage is no more determinative of absolute immunity than the fact that, at that stage, a judge issues a search warrant or supervises a grand jury. The critical consideration is that the prosecutor's assessment of the legal consequences of police investigative conduct is directly related to his obligation to screen and develop cases for



trial. Similarly, this assessment of the existence of probable cause to arrest is integral to the decision to file formal charges and to the admissibility at trial of evidence seized in the course of the arrest. Moreover, the role of the prosecutor in furnishing such advice interposes a check on law enforcement activity and bolsters the fairness of the criminal justice process. The availability of damages actions for the giving of such advice would seriously threaten to divert the time and energy of the prosecutor, might discourage him from acting as a check on the activities of the police, and, most importantly, might substantially affect the exercise of his judgment in deciding whether to bring formal charges, and how to proceed once those charges have been brought.

Although there is no clear common law tradition with respect to the prosecutor's role in providing legal advice, that history should not be controlling. The office of professional public prosecutor was largely unknown at English common law, and in this country, the office was largely confined to the accusatory stages of the criminal process until relatively recent times. But the importance of the prosecutor's role in the investigative stage, and its close relation to his more traditional accusatory role, are now widely recognized.

Recognition of absolute immunity in the circumstances of this case is supported by the availability of alternative means of correction and deterrence. Those means include judicial review of police conduct in both civil and criminal proceedings, the exercise of judicial supervisory power to correct prosecutorial abuses, and the various avenues for subjecting prosecutors to professional discipline.

C. When a prosecutor elicits testimony during a probable cause hearing to obtain a search warrant, he is also entitled to absolute immunity from liability for damages. His participation in the obtaining of the warrant is an integral part of his responsibility to screen and prepare cases for later judicial proceedings, and his participation also furthers his role in safeguarding the criminal justice process. As with legal advice, the availability of

civil damages actions might deter prosecutors from performing this valuable function—a function that is clearly of importance to the court's understanding of the need for a warrant and the sufficiency of the application.

The basis for absolute immunity here is closely analogous to the common law immunity afforded to prosecutors from actions for malicious prosecution. And again, as in the realm of legal advice, there are significant alternative means of correcting and deterring prosecutorial abuse.

## ARGUMENT

### PROSECUTORS ARE ABSOLUTELY IMMUNE FROM SUIT FOR DAMAGES FOR GIVING LEGAL ADVICE TO POLICE OFFICERS ABOUT THE CONDUCT OF CRIMINAL INVESTIGATIONS AND FOR PARTICIPATING IN JUDICIAL PROCEEDINGS RELATED TO SUCH INVESTIGATIONS

#### A. Under This Court's Decisions, Absolute Immunity Shields The Performance Of Those Prosecutorial Functions That Directly Affect The Fairness And Integrity Of The Judicial Process

1. In *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [42 U.S.C.] 1983." In so holding, the Court concluded that such activities "were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430. Those reasons included the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust," *id.* at 423, the concern that such litigation "could have an adverse impact upon the functioning of the criminal justice system," *id.* at 426,



and the availability of other checks on prosecutorial misconduct short of civil damages actions, *id.* at 429.

As this Court has recognized, the prosecutor's institutional role includes a variety of responsibilities beyond the filing of criminal charges and presenting the State's case in the courtroom. In *Imbler* v. *Pachtman*, for example, the Court noted that the prosecutor's task may "cast him in the role of an administrator or investigative officer," 424 U.S. at 430-431, and even the purely advocatory functions of initiating and presenting a case may require preliminary "actions apart from the courtroom," *id.* at 431 n.33. In *Imbler*, however, the Court had no occasion to determine the issues presented here—whether and to what extent absolute immunity shields these prosecutorial functions.

In approaching these issues, we recognize the Court's unwillingness to give expansive scope to the concept of absolute immunity. See *Forrester* v. *White*, 484 U.S. 219, 224 (1988). As in other contexts, the scope of such absolute prosecutorial immunity must be "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* at 227. Under such a functional approach to absolute immunity, it is admittedly difficult to draw any broad generalizations regarding which of the prosecutor's various official tasks warrant protection. Nonetheless, the Court's unwavering concern with protecting the exercise of those functions that directly affect the fairness, accuracy, and integrity of the judicial process provides the pertinent benchmark.

The Court has long held that judges may not be subjected to civil suit for the exercise of decisionmaking authority that colorably falls within their jurisdiction and is tied to their role in the judicial process. *E.g.*, *Forrester* v. *White*, *supra*; *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872). The Court has accorded trial witnesses similar protection, principally to insure that the integrity of the judicial process is not impaired by witnesses' fears that accurate and

complete testimony will expose them to damages actions. *E.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). Moreover, although the full scope of prosecutorial immunity is not settled, *Imbler* makes plain that—at a minimum—civil damages liability may not be based on the performance of those prosecutorial functions that are "intimately associated with the judicial phase of the criminal process" ~~may not ground civil damages liability~~. *Imbler* v. *Pachtman*, 424 U.S. at 430; see *Butz* v. *Economou*, 438 U.S. 478, 516-517 (1978).

2. This Court's functional approach and its overarching concern with preserving the integrity of the judicial process suggest the appropriate framework for determining the scope of absolute immunity in this case. That framework calls for the Court first to identify the particular prosecutorial functions implicated by the challenged conduct. The Court should then assess whether the specter of a damages action will unduly hamper the prosecutor's exercise of those functions and, if so, will ultimately impair the fairness and integrity of the judicial process itself. See, *e.g.*, *Westfall* v. *Erwin*, 484 U.S. 292, 295-296 & n.3 (1988); *Forrester* v. *White*, 484 U.S. at 223-224; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811-812 (1982); *Butz* v. *Economou*, 438 U.S. at 511-517; *Doe* v. *McMillan*, 412 U.S. 306, 319-320 (1973). The Court should next consider the historical materials—whether there were analogous practices and precedents at common law and whether those practices and precedents cast light on the protection to be afforded. Finally, the Court should consider the extent to which alternatives to a damages remedy can rectify and deter misuse of prosecutorial authority. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 521-522 (1985); *Briscoe* v. *LaHue*, 460 U.S. at 330-336; *Imbler* v. *Pachtman*, 424 U.S. at 421-429.

Under this framework, respondent's challenged prosecutorial activities warrant absolute immunity from suit for damages. Those activities—giving legal advice to police officers about the conduct of an investigation and later participating in a judicial proceeding to obtain a



search warrant—are integral to core prosecutorial functions, namely, screening cases for formal presentment of charges and later judicial proceedings and safeguarding the fairness of the criminal justice process. Exposing such conduct to the intimidation and harassment of civil litigation would thus undermine the judicial process itself—a result not at all compelled by relevant common-law principles. Finally, there are other means available—short of a civil damages remedy—to provide adequate legal redress for injuries arising from prosecutors' misconduct in discharging their responsibilities.

### B. Giving Legal Advice To Police Officers About The Conduct Of An Investigation Is Integral To The Prosecutor's Functions Of Screening Cases For Formal Presentment Of Charges And Later Judicial Proceedings And Of Safeguarding The Fairness Of The Criminal Justice Process

1. Petitioner first seeks to hold the prosecutor liable for injuries arising out of his legal advice to the police officers during the course of their investigation, *i.e.*, his approval of the officers' request to question petitioner under hypnosis and his later advice to the officers that there was probable cause to arrest her.[12] In petitioner's view (Br. 17-22), such conduct on behalf of a prosecutor merely furthers a police investigation and thus falls outside the scope of absolute immunity recognized in *Imbler*.

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[12] Both the district court, Pet. App. 15a-17a, and the court of appeals, *id.* at 13a, expressly found that respondent's challenged conduct amounted to the giving of "legal advice." Petitioner has offered no persuasive reason to challenge that factual finding concurred in by both lower courts. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

In the district court, petitioner also sought relief for respondent's alleged role in securing a warrant for her arrest. See Compl. ¶ 34. The district court apparently rejected that claim at some point before it granted respondent's motion for a directed verdict. See Tr. 199, 205. Petitioner has not raised that claim before this Court.

At the outset, petitioner's labelling of conduct as "investigative" or "advocatory" is largely beside the point, since it ignores the particular activity's relation to the functions entrusted to the prosecutor and the significance of those functions in the criminal justice process. Cf. *Gray* v. *Bell*, 712 F.2d 490, 499 n.21 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (rejecting contention that prosecutorial immunity turns on whether conduct can be labelled advocatory, investigatory, or administrative). Certain activities in the course of an investigation may be crucial to the prosecutor's role in screening a case or preparing for trial. Indeed, as this Court has noted, "[p]reparation both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Imbler* v. *Pachtman*, 424 U.S. at 431 n.33. Accordingly, lower courts have recognized that the core prosecutorial functions protected by *Imbler*'s absolute immunity encompass "investigatory" activity that is needed to evaluate and prepare a criminal prosecution. See, *e.g.*, *Gobel* v. *Maricopa County*, 867 F.2d 1201, 1204 (9th Cir. 1989); *Cook* v. *Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981). Thus, the central question is not, as petitioner asserts, whether the activity can be characterized as "investigatory". Rather, the inquiry centers on whether the activity at issue furthers a prosecutorial function that must be shielded from vexatious damages actions in order to protect the fairness and integrity of the judicial process.

Petitioner's amici (ACLU Br. 15-17) similarly err in contending that when a prosecutor gives legal advice to the police in connection with a criminal investigation, the advice is not a "uniquely prosecutorial function" mandated by the judicial process but is instead more closely allied to law enforcement functions that have been afforded only qualified immunity. This Court has emphasized that absolute immunity must be determined by "the nature of the function performed, not the identity of



the actor who performed it * * *." *Forrester* v. *White*, 484 U.S. at 229. To be sure, if the various participants in the criminal justice system performed functions that were not only characteristic of their office but also mutually exclusive, a "uniquely prosecutorial" test might have some validity. But the functions assigned to those participants cannot be so neatly pigeonholed.

Judges, for example, perform several functions that are closely tied to criminal investigations. As the Court has explained:

> [F]ederal courts have traditionally supervised grand juries and assisted in their "investigative function" by, if necessary, compelling the testimony of witnesses. * * * Federal courts also participate in the issuance of search warrants, * * * and review applications for wiretaps, * * * both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding.

*Morrison* v. *Olson*, 487 U.S. 654, 681-682 n.20 (1988) (citations omitted). Such actions are essential to the judicial function and thus, despite their "investigatory" attributes, fall within the ambit of a judge's absolute immunity. For similar reasons, the fact that a prosecutor's actions may aid a criminal investigation cannot be determinative on the question of absolute immunity. To the contrary, the scope of prosecutorial immunity depends on the significance of the pertinent prosecutorial function as it implicates the need to protect the judicial process itself.

2. Turning to that inquiry, we believe that the prosecutor's legal advice to the police about the conduct of an investigation is integral to two core, interrelated prosecutorial functions—screening cases for formal presentment of charges and later judicial proceedings and safeguarding the fairness of the criminal justice process.

First, the prosecutor's assessment of the legal consequences of police investigative conduct is directly related to his obligation to screen and develop cases for trial. See, *e.g.*, 1 ABA Standards for Criminal Justice 3-3.4 &

pp. 3.46 to 3.47 (2d ed. 1980) (ABA Standards); National District Attorneys Ass'n, National Prosecution Standards 8.6 & pp. 126-128 (1977) (National Prosecution Standards). For example, the propriety of using hypnosis as a means of interrogating a suspect in a murder investigation would affect the admissibility of that person's statements (and fruits of those statements) in any criminal proceeding. See, *e.g.*, *Rowley* v. *State*, 483 N.E.2d 1078, 1081 (Ind. 1985); cf. *Rock* v. *Arkansas*, 483 U.S. 44, 56-62 (1987). And in this case, given the apparent lack of incriminating evidence other than petitioner's statements under hypnosis, it is evident that the legal consequences of that interrogation bore directly on the strength of the State's case and would have been taken into account in the decision to file formal charges. See, *e.g.*, 1 ABA Standards 3-3.6 & 3-3.7 & pp. 3.49 to 3.52; National Prosecution Standards 9.4.

Similarly, the prosecutor's assessment of whether the police had probable cause to make a warrantless arrest bears on his view of the strength of the state's case against a suspect. Absent probable cause, the arrest would be invalidated, any evidence seized incident to the arrest could be rendered inadmissible, and the basis for lodging formal charges against the suspect would be undermined. Viewed from this perspective, the prosecutor's assessment here of whether the police had probable cause to arrest petitioner would likely be an integral part of his formal charging decision.[13] Indeed, as lower courts have recognized, "[t]he initial determination of whether such probable cause exists is part of the larger process of determining whether to initiate a prosecution." *Marx* v. *Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988); accord

[13] Under Indiana law, the police must promptly bring an individual arrested without a warrant before a judicial officer for a probable cause determination that a crime was committed. See Ind. Code Ann. § 35-33-7-2 (Burns 1985). The authorities may not seek an arrest warrant unless the suspect has first been formally charged with a crime. See Ind. Code Ann. § 35-33-2-1(c) (Burns 1985).



*Myers* v. *Morris*, 810 F.2d 1437, 1448 (8th Cir.), cert. denied, 484 U.S. 828 (1987); but cf. *Wolfenbarger* v. *Williams*, 826 F.2d 930, 937 (10th Cir. 1987) (prosecutor's advisory function entitled only to qualified immunity).

Second, the provision of legal advice about the propriety of police conduct furthers the prosecutor's institutional responsibility to safeguard the fairness of the criminal judicial process. This Court has emphasized that the prosecutor's institutional role extends beyond his obligation to serve as an advocate for the state:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

*Berger* v. *United States*, 295 U.S. 78, 88 (1935); accord *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802-804 (1987).

Under that well-recognized obligation, the prosecutor has the responsibility to "provide legal advice to the police concerning police functions and duties in criminal matters." ABA Standards 3-2.7(a); accord ABA Model Code of Professional Responsibility EC 7-13 (1989).[14] Thus, when a prosecutor advises police officers about the legal ramifications of their conduct he truly acts in a "quasi-judicial" capacity, not simply because he renders a legal opinion, but because the exercise of the prosecu-

[14] See also Indiana Rules of Professional Conduct 3.8, comment (1990) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

tor's judgment in rendering that opinion interposes a check on law enforcement activity and bolsters the fairness of the criminal justice process.

3. The prosecutorial functions implicated by a prosecutor's legal advice—screening cases for formal presentment of charges and later judicial proceedings and safeguarding the fairness of the criminal justice process—warrant the protection of absolute immunity. Since the provision of legal advice furthers the prosecutor's ability to screen and develop cases, such conduct should be accorded absolute immunity for the same reasons as those articulated in *Imbler*: a prosecutor must be free to exercise his discretion to initiate a criminal proceeding without fear that an error will embroil him in civil dsputes and expose him to personal liability, thereby "caus[ing] a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. at 423.

Similarly, insofar as the prosecutor's legal advice furthers the "quasi-judicial" function of safeguarding the fairness of the criminal justice process, a prosecutor should not be subject to the risk that the mere expression of an opinion as to the legality of a police action will expose him to damages suits. As the court of appeals pointed out, any other result will discourage the prosecutor from providing such advice, thereby removing an important and salutary check on police conduct of an investigation:

> [I]t is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutors from fulfilling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques, and the possibility that their proposed conduct will violate the rights of their suspects.



Pet. App. 12a-13a.[15]

The prosecutorial functions implicated by giving legal advice need the shield of absolute immunity precisely because qualified or conditional immunity will not adequately insure that the prosecutor can perform these functions without becoming entangled in damages actions. To be sure, such reduced protection would still preclude liability if the prosecutor's conduct does not violate clearly established federal law. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. at 815-819. That potential liability, however, is only one aspect of the problem. Protection is also needed to offset the substantial risk of committing the prosecutor's time and resources to defending against damages actions, and to reduce the chilling effect of potential lawsuits. By its terms, qualified immunity—an affirmative defense—does not insulate prosecutors from the risk of vexatious litigation. See *Anderson* v. *Creighton*, 483 U.S. 635, 646-647 n.6 (1987).

Indeed, in *Imbler* this Court accorded the protection of absolute immunity to certain prosecutorial functions because any lesser protection would still force the prosecutor to answer in court every time a disgruntled individual alleged official misconduct. *Imbler* v. *Pachtman*, 424 U.S. at 424.[16] That reasoning obtains here. The prosecu-

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[15] There will be instances in which a prosecutor not only expresses a legal opinion on the ramifications of police conduct but also controls or actively participates in a law enforcement investigation. See, *e.g.*, *Robinson* v. *Via*, 821 F.2d 913, 918-919 (2d Cir. 1987) (participating in raid during preliminary investigation); *Rex* v. *Teeples*, 753 F.2d 840, 843-844 (10th Cir. 1985) (interviewing suspect during investigation). The question whether and to what extent absolute immunity shields those sorts of prosecutorial activities is not presented here since respondent's role was entirely advisory. See note 12, *supra*.

[16] We recognize, as did the court of appeals (Pet. App. 8a n.3), that the functional analysis underlying a claim of absolute immunity may itself require resolution of certain factual matters

torial functions implicated in this case—screening cases for formal presentment of charges and trial and safeguarding the fairness of the criminal justice process—are no less important than those addressed by *Imbler*.

Moreover, the absolute immunity recognized in *Imbler* would itself be eroded if litigants, through artful pleading, could freely assert claims based on prosecutorial conduct warranting only qualified immunity. As a practical matter, decisions regarding presentation of the case or the initiation of a prosecution—the core functions entitled to absolute immunity under *Imbler*—can often be linked to some series of actions preceding the filing of formal charges. If preliminary actions—such as assessing probable cause to arrest or evaluating the admissibility of evidence—are accorded less than full protection, the absolute immunity recognized in *Imbler* will inevitably be diminished, and the risk that prosecutors will be subjected to vexatious claims for damages will be substantially increased.

4. Contrary to the suggestion of petitioner's amici (ACLU Br. 7-8), the absence of any clear common law tradition of absolute immunity in the circumstances of this case does not foreclose the result reached by the courts below. Although that tradition has informed the Court's decisions, the Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson* v. *Creighton*, 483 U.S. at 645.

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and thus expose prosecutors to some degree of entanglement in damages actions. Nonetheless, even if the protection afforded by absolute immunity is not complete, it is a far more effective means of insuring that many—if not all—damages actions against prosecutors will present pure questions of law that, contrary to petitioner's view (Br. 25), the court can resolve on the pleadings. Cf. *Haynesworth* v. *Miller*, 820 F.2d 1245, 1266 n.161 (D.C. Cir. 1987) (noting that claim of absolute immunity can be resolved on pleadings where complaint fairly discloses the character of the challenged official conduct).



In the first place, the office of professional public prosecutor was largely unknown at English common law. See Kress, *Progress and Prosecution*, 423 Annals 99, 100-101 (1976); Langbein, *The Origins of Public Prosecution at Common Law*, 17 Am. J. Legal Hist. 313 (1973). That office, which developed in this country during the eighteenth and nineteenth centuries, initially confined its jurisdiction to the formal accusatory—as opposed to investigatory—stages of the criminal process, *i.e.*, filing formal criminal charges, dismissing charges initiated by the police, and presenting the state's case in court. See J. Jacoby, *The American Prosecutor: A Search For Identity* 11-19 (1980); McDonald, *The Prosecutor's Domain*, in *The Prosecutor* 15, 23-28 (W. McDonald ed. 1979). Indeed, such prosecutorial control as the provision of legal advice to police about pending investigations is principally a twentieth-century phenomenon. See J. Jacoby, *supra*, at 107-110; McDonald, *supra*, at 32-38. Thus, the prosecutor's conduct at issue here—advising the police about the consequences of an investigative technique or the legal bases for an arrest—cannot be fairly compared to functions performed by prosecutors in times past.

As this Court suggested in *Anderson* v. *Creighton*, the absence of a comparable common law analogue should not preclude extension of absolute immunity to modern prosecutorial functions. Rather, the scope of immunity should turn on the substantial public interest in vigorous exercise of those current day functions that directly affect the integrity of the judicial process. Here, immunity from damages liability for the prosecutor's giving legal advice to police officers facilitates the exercise of the prosecutor's discretionary function to initiate and conduct judicial proceedings—a function that in turn serves the weighty public interest in promoting the fairness and efficacy of criminal justice.[17]

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[17] Indeed, the integral relation between the actions complained of here and the more traditional functions of the public prosecutor

5. Finally, according absolute immunity in the circumstances of this case is warranted because of other available checks on prosecutorial misconduct. First, police conduct itself is amenable to judicial review in both civil and criminal proceedings. For example, warrantless arrests are subject to prompt judicial hearings for probable cause determinations. See, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103 (1975); see Ind. Code Ann. § 35-33-7-1 and 2 (Burns 1985). Similarly, as shown by petitioner's defense of the state criminal charges, material statements obtained through improper invesitgative techniques are subject to judicial review. See, *e.g.*, Ind. R. Crim. P. 3; Fed. R. Crim. P. 12(b).

Second, a court may exercise its supervisory power to correct misuses of prosecutorial authority that result in fundamental and pervasive prejudicial errors in the judicial process. See, *e.g.*, *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 809-810; *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). Third, as this Court recognized in *Imbler*, 424 U.S. at 429, prosecutors remain subject to professional discipline and may be held accountable for engaging in conduct that violate standards of professional ethics. See, *e.g.*, ABA Code of Professional Responsibility DR 7-103(A) (1989).[18]

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strongly suggests that common law immunity would have been afforded to such actions for the same reasons that immunity was afforded from actions for malicious prosecution. See pp. 25-26, *infra*. The case, in other words, is very different from one in which courts at common law declined to recognize claims of absolute immunity for the same kinds of prosecutorial conduct that are the subject of a present day damages action.

[18] Under regulations promulgated by the Attorney General, federal prosecutors guide their conduct by the ABA Code of Professional Responsibility. See 28 C.F.R. 45.735-1(b). The Office of Professional Responsibility of the Department of Justice investigates allegations of professional misconduct by federal prosecutors. Violations of applicable ethical standards subject prosecutors to disciplinary sanctions. See 28 C.F.R. 45.735-1(c).



We acknowledge that such remedies may not afford complete redress in every case of prosecutorial misconduct. But the substantial public interest in protecting the integrity of the criminal justice process outweighs any shortcomings in the panoply of remedies. Indeed, this Court has recognized that

> [a]s public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.

*Ferri* v. *Ackerman*, 444 U.S. 193, 202-203 (1979).

### C. Eliciting Testimony During A Probable Cause Hearing To Obtain A Search Warrant Is Also Integrally Related To the Prosecutor's Essential Functions

Under the framework and analysis set forth above, the prosecutor's participation in a judicial hearing to obtain a search warrant—conduct intimately connected with the judicial process itself—also merits absolute immunity from suit for damages.

1. First, the prosecutor's participation in obtaining a search warrant is an integral part of his responsibility to screen and prepare cases for later judicial proceedings. In setting forth the standards regarding the prosecutor's "[d]ecision to charge," leading authorities state that "[a]bsent exceptional circumstances, no arrest warrant or search warrant should issue without the approval of the prosecutor." ABA Standards 3-3.4(b); accord National Prosecution Standards 7.3. The federal government has an established practice of requiring prosecutors to review applications for search warrants. See 28 C.F.R. 59.4(b) and 60.1. And today, many state and local juris-

dictions follow similar procedures. See R. Van Duizend, L. Sutton, & C. Carter, *The Search Warrant Process* 20-21 (1985); ABA Standards 3-3.4(c), pp. 3.45 to 3.46. That screening function is necessarily one component of the prosecutor's ultimate charging function. By reviewing the warrant application, the prosecutor can insure that the application is sound and thus can minimize the risk of suppression of evidence critical to the state's case. Cf. *Malley* v. *Briggs*, 475 U.S. 335, 345-346 (1986).

Second, the prosecutor's participation in the probable cause hearing—aiding the court to determine the existence of probable cause—furthers his role in safeguarding the criminal justice process.[19] That participation not only clarifies for the court the bases of the warrant application, but also enables the court directly to pose questions to the prosecutor as an aid to understanding the need for and sufficiency of the application. In these circumstances, the prosecutor's participation, when properly discharged, helps assure the fairness of the warrant proceeding and ultimately of the criminal justice process as a whole.[20]

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[19] Ordinarily, applications for search warrants are submitted with written affidavits. See, *e.g.*, Fed. R. Crim. P. 41(c)(1); Ind. Code Ann. § 35-33-5-2(a) (Burns 1985). State and federal criminal procedure, however, provide that courts may issue search warrants on the basis of sworn testimony elicited at a hearing. See, *e.g.*, Fed. R. Crim. P. 41(c)(2); Ind. Code Ann. § 35-33-5-2(c) (Burns 1985).

[20] Petitioner (Br. 22-23) and her amici (ACLU Br. 18-19) maintain that respondent, in eliciting testimony at the search warrant hearing, performed an "investigatory" function. The record belies that characterization. Respondent played no role in the management or conduct of the police officers' investigation, including their decision to search petitioner's house. See Tr. 44, 134-135. As respondent explained, "I was told [the police officers] wanted a search warrant. I went to court to ask the officers what it was they based their request on." Tr. 145.

For that reason, petitioner's amici (ACLU Br. 19-20) err in relying on *Malley* v. *Briggs*, 475 U.S. 335 (1986). There, the police officer who testified at the probable cause hearing was directing the criminal investigation and made the decision to procure the warrant. *Id.* at 338-339. Here, by contrast, respondent's role was limited to eliciting testimony to enable the court to make the probable cause determination. And application of absolute immunity is not foreclosed by the fact that a prosecutor, who participates in a judicial proceeding to aid the police in obtaining a search warrant, may be seen as performing a police or investigatory function. A judge who issues a search warrant also facilitates a police investigation, but he is nonetheless entitled to absolute immunity—even if it should have been obvious that the application was inadequate. See *Pierson* v. *Ray*, 386 U.S. 547 (1967). The pertinent inquiry is not whether the challenged action relates to (or furthers) a police investigation. Rather, the inquiry is whether that action furthers an institutional function that directly affects the fairness and integrity of the judicial process. Viewed from this perspective, the prosecutor's efforts to assist the court in a probable cause hearing fall within that category of functions meriting immunity.



2. For the reasons detailed above, see pp. 18-23, *supra*, the prosecutorial function of participating in the search warrant hearing warrants the protection of absolute immunity.

First, absent such protection, the prosecutor could be exposed to repeated claims for damages arising out of his review of search warrant applications or participation in search warrant proceedings. That could in turn chill a prosecutor's willingness vigorously to support mertiorious warrant applications.

Second, had the prosecutor's screening function existed before modern times, we believe that common law would have recognized an immunity from suit with respect to his participation in warrant proceedings. Although the common law did not provide immunity to the complaining witness at a warrant hearing, see *Malley* v. *Briggs*, 475 U.S. at 340-341 & n.3, the prosecutor who elicits testimony at such a hearing is not acting as a witness. Rather, at that point, the prosecutor is actually furthering the state's criminal prosecution of the target of the search. The analogous common law tort embracing such conduct is malicious prosecution. See, *e.g.*, *Hardin* v. *Hight*, 106 Ark. 190, 197, 153 S.W. 99, 101 (1913) (pro-

curing search warrant may ground action for malicious prosecution): *Harlan* v. *Jones*, 16 Ind. App. 398, 45 N.E. 481 (1896) (same). And, as *Imbler* makes clear, prosecutors were generally held immune from claims of malicious prosecution at common law. *Imbler* v. *Pachtman*, 424 U.S. at 421-423.

Third, prosecutorial misconduct at search warrant hearings can be adequately remedied through means other than a damages remedy. Errors at that early stage of the criminal process can be quickly exposed to judicial scrutiny, even before the institution of criminal charges, by a motion for the return of property seized. See, *e.g.*, Ind. Code Ann. §§ 35-33-5-5(b) and 35-43-4-4(h) (Burns 1985 & Supp. 1990); Fed. R. Crim. P. 41(e). Moreover, after charges are lodged, prosecutorial improprieties may be effectively remedied on pretrial motions seeking to dismiss those charges or on motions to suppress evidence seized as a result of the search. Lastly, the various disciplinary mechanisms in place for policing prosecutorial misconduct are available to rectify and deter such misuse of official authority.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 89-1715



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

CATHY BURNS,

*Petitioner*,

—v.—

RICK REED,

*Respondent*.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to preserving and protecting the rights and liberties embodied in the Constitution and the Bill of Rights. The Indiana Civil Liberties Union (ICLU) is one of its statewide affiliates. In defense of those rights and liberties, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

The ACLU has long been concerned that victims of constitutional violations have access to legal remedies to vindicate constitutional guarantees and to provide them with redress. Civil damage actions against officials who commit constitutional violations are an important form of legal remedy for official misconduct. The effectiveness of such actions is undermined when a government official is granted immunity from civil damage liability. As this Court recognized in *Forrester v. White*, 484 U.S. 219, 223 (1988), there is an "undeniable tension between official immunities and the ideal of the rule of law." For this reason, the ACLU is concerned with any proposal to expand the scope of official immunities in derogation of the rights of victims of constitutional misconduct.

## STATEMENT OF THE CASE

On September 2, 1982, an unknown assailant entered Cathy Burns' home, knocked her unconscious with a blunt instrument, and shot her two sons in their sleep. The police officers assigned to the case decided that Burns was herself their prime suspect, despite her re-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3.

peated denials, as well as exculpatory results from polygraph, handwriting, and voice stress tests.

To explain this apparent inconsistency, the investigating officers decided that Burns must be a multiple personality and sought to prove their theory by questioning her under hypnosis. Because one of the officers recalled that hypnosis was an unacceptable investigative technique, the officers sought advice from respondent, the police liaison attorney in the county prosecutor's office. He advised them to go ahead with the hypnotic interrogation. Under hypnosis, Burns identified her assailant as someone named "Katie." At another point in the questioning, she also referred to herself by that name. The police officers and respondent chose to interpret this as a confession.

Respondent then brought one of the police officers before a judge to obtain a search warrant for Burns' home and car. He elicited testimony from the officer about Burns' "confession," without revealing that this was the officer's interpretation of Burns' hypnotized statements. The judge issued the search warrant on the basis of this misleading presentation. An equally misleading affidavit from another investigator led to the issuance of a warrant for Burns' arrest for attempted murder. Following her arrest, she was held in a psychiatric ward for observation for four months. Ultimately, the doctors concluded that she was not a multipie personality, and the charges against Burns were dropped after the court learned that her alleged confession had been obtained by hypnosis. As a result of this ordeal, Ms. Burns lost her job and lost custody of her children. In addition, respondent told the press that he continued to believe her to be guilty.

Burns brought the present §1983 suit against respondent and a number of police officers. The police officers settled out of court for $250,000 and the case proceeded to trial against respondent. At the close of



plaintiff's case, the trial court granted respondent a directed verdict on the ground that he was absolutely immune from civil damages for his conduct. The Seventh Circuit affirmed on the same ground.

## SUMMARY OF ARGUMENT

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that a state prosecutor was absolutely immune from a civil suit for damages under 42 U.S.C. §1983 for his conduct in initiating a prosecution and in presenting the state's case. The decision, however, specifically left open the question whether such absolute immunity would extend to prosecutorial misconduct in his administrative or investigatory activities. That question, at least in part, is squarely presented by the present case.

*Amici* suggest that absolute immunity should not be extended to shield such conduct. Because absolute immunity bars recovery for even the most flagrant constitutional violations, this Court has restricted its application to especially sensitive governmental functions. A prosecutor's investigatory activities do not fall into this category: They were not protected by absolute immunity at common law, and they are more akin to the functions performed by law enforcement officials subject to qualified immunity than to the conduct of judges and jurors. Absolute immunity should be limited solely to those uniquely prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. For other conduct, such as providing legal advice to police officers and obtaining a search warrant, the actions at issue in the present proceeding, state prosecutors should be provided with only the same qualified immunity that protects police officers and other executive branch officials, who can and do routinely perform similar functions. *See, e.g., Pierson v. Ray*, 386

U.S. 547 (1967); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

## ARGUMENT

### I. ABSOLUTE IMMUNITY, WHICH BARS RECOVERY FOR EVEN THE MOST FLAGRANT CONSTITUTIONAL VIOLATIONS, SHOULD BE RESTRICTED TO THOSE SPECIAL FUNCTIONS THAT REQUIRE COMPLETE PROTECTION

There is an inherent conflict between absolute immunity for official conduct and the protection of constitutional rights. As this Court has repeatedly affirmed, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also Butz v. Economou*, 438 U.S. 478, 485 (1978). And, in many cases, the only meaningful remedy for a completed constitutional violation is a remedy of damages. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 410 (1971)(Harlan, J., concurring) (in such cases, "it is damages or nothing"). *See also id.* at 395 ("[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"); *Butz v. Economou*, 438 U.S. at 506 ("[i]n situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees"). Thus, "[t]he extension of absolute immunity from damages liability . . . [can] seriously erode the protection provided by basic constitutional guarantees." *Id.* at 505.

For this reason, this Court has been "quite sparing" in recognizing claims to absolute immunity by government officials. *Forrester v. White*, 484 U.S. 219, 224 (1988). Instead, the Court has found that a form of "qualified immunity," which protects officials from liability except for violations of "clearly established statutory or constitutional rights," is generally sufficient to protect government officials in the exercise of their duties. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)("qualified immunity represents the norm" for executive branch officials).[2] Recognition of such qualified immunity has allowed this Court to "avoid[] unnecessarily extending the scope of the traditional concept of absolute immunity." *Forrester v. White*, 484 U.S. at 224.

In deciding whether official conduct should be shielded by absolute as opposed to qualified immunity, this Court's rulings have not been guided by the job title of the governmental defendant.[3] Rather, the Court has engaged in a "functional" analysis of immunity. Under this analysis, "we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. at 224. Moreover, the burden rests on the public official seeking absolute immunity to demonstrate that such protection is essential

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[2] It is important to note the substantial change in the protection afforded by qualified immunity brought about by this Court's decision in *Harlow v. Fitzgerald*. Prior to *Harlow*, an official's immunity depended in part upon his subjective belief in the legality of his actions; thus, if his good faith was disputed, qualified immunity could not be invoked until after the relevant facts had been developed at trial. *See, e.g., Imbler v. Pachtman*, 424 U.S. at 419 n.13. By contrast, under the objective standard established in *Harlow*, a court may invoke qualified immunity to dismiss a suit or grant summary judgment wherever the alleged misconduct did not violate "clearly established statutory or constitutional rights." Thus today, unlike when *Imbler* was decided, qualified immunity, like absolute immunity, can "defeat[] a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. at 419 n.13.

[3] The one exception to this rule is the President, who has been held to be exempt from civil damages in all cases, due to his role in our constitutional system. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

for the proper performance of the job functions at issue. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. at 812-13.

These prior rulings define the issue before the Court. The respondent in this case is not entitled to absolute immunity simply by virtue of his position as Chief Deputy Prosecutor for Delaware County. Rather, respondent bears the burden of demonstrating that qualified immunity would not adequately protect him and other prosecutors with regard to the conduct at issue in this case.

## II. STATE PROSECUTORS SHOULD BE AFFORDED ONLY QUALIFIED IMMUNITY FROM CIVIL DAMAGE LIABILITY FOR CONSTITUTIONAL VIOLATIONS COMMITTED IN THE COURSE OF THEIR INVESTIGATORY ACTIVITIES

As noted above, *Imbler v. Pachtman* established that a prosecutor is protected by absolute immunity for her conduct "in initiating a prosecution and in presenting the State's case." 424 U.S. at 431. In reaching this decision, the Court was guided by three principal considerations: a prosecutor's absolute immunity at common law to a suit for malicious prosecution, *id.* at 421-22; the analogous immunity of judges and grand jurors, *id.* at 422-24; and "'the policy of protecting the judicial process.'" *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983)(*quoting Imbler*, 424 U.S. at 439 (White, J., concurring)). None of those rationales justify extending absolute immunity to a prosecutor's participation in investigatory activities.[4]

At common law, prosecutors were absolutely immune from liability for malicious prosecution and for defamatory remarks uttered in judicial proceedings. *Imbler v. Pachtman*, 424 U.S. at 437-40 (White, J., concurring). They were not, however, absolutely immune from civil liability for their investigatory conduct. Specifically, when sued for the tort of false arrest, prosecutors, like police officers, possessed only the qualified immunity afforded by the defense of "good faith and probable cause." *See Pierson v. Ray*, 386 U.S. at 555-57 (police officers entitled to qualified immunity for false arrest both at common law and under §1983); *Schneider v. Shepherd*, 158 N.W. 182 (Mich. 1916)(prosecutors not absolutely immune from suit for false arrest).[5] The present case, in part, raises just such a claim of unconstitutional arrest. Since Congress, in enacting §1983, did not indicate any intention to expand upon immunities available at common law, this Court has been reluctant to read into that statute immunities beyond those recognized by the common law courts of the nineteenth century. For example, in *Malley v. Briggs*, 475 U.S. 335 (1986), this Court observed: "Since the statute [§1983] on its face does not provide for *any* immunities, we

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[4] *Imbler v. Pachtman* expressly left unresolved the immunity of a prosecutor when acting in either an administrative or an investigatory capacity. 424 U.S. at 430. The present case addresses only the prosecutor's investigatory role. Absolute prosecutorial immunity for administrative conduct was at least implicitly rejected in *Forrester v. White*, 484 U.S. 219 (1988), which held that a judge was not absolutely immune under §1983 for actions taken in his administrative capacity.

[5] Prior to this Court's decision in *Imbler*, several courts of appeals had likewise held that prosecutors were not absolutely immune from suit under §1983 for initiating unconstitutional arrests. *See Imbler v. Pachtman*, 424 U.S. at 441 n.6 (White, J., concurring)(collecting cases).

would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Id.* at 342 (emphasis in original).

Likewise, the analogy to the immunities granted to judges and grand jurors breaks down when a prosecutor's investigatory functions are examined. The *Imbler* decision observed that a prosecutor's decision to prosecute is comparable to the decisions required of judges and jurors: "all three officials . . . exercise a discretionary judgment on the basis of evidence presented to them." 424 U.S. at 423 n.20. Because of this "functional comparability," prosecutorial immunity was termed "quasi-judicial." *Id.*

By contrast, when a prosecutor participates in evidence-gathering activities, her role ceases to be comparable to that of a judge or jury. She is no longer engaging in the impartial weighing of evidence presented to her, but rather actively seeking additional information, either to support a position already adopted or to inform a decision she has yet to make. In these functions, the analogous actor in the criminal justice process is not the judge or juror, but the police officer. And as noted earlier, police officers receive only qualified immunity for their conduct. *Pierson v. Ray*, 386 U.S. at 555-57.

For this same reason; the policy of protecting the judicial process is not directly implicated by lawsuits seeking damages for a prosecutor's investigatory conduct. In immunizing a prosecutor's decision to prosecute, this Court sought to prevent "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. As in other instances of absolute immunity, the principle at stake was the protection of independent, impartial decisionmaking based on appropriate criteria. *Id.* at 435 (White, J., concurring); *see also Forrester v. White*, 484 U.S. at 226 ("rationale for these decisions -- freeing the judicial



process of harassment or intimidation"). This Court feared that, because no one would sue a prosecutor for failing to indict, prosecutors would become too cautious and err too often in that direction. *Imbler*, 424 U.S. at 423-24; *id.* at 438 (White, J., concurring).

The same considerations are not present when a prosecutor renders investigatory decisions. In that role, her primary concern is to get as many facts as possible, not to weigh the pros and cons of going forward. Thus, in these areas the threat of civil damage liability becomes a valuable counterbalance to the inherent bias toward gathering ever more information; it discourages the prosecutor from acting too close to the edge of unconstitutional conduct. *Cf. Forrester v. White*, 484 U.S. at 223 (Court is "[a]ware of the salutary effects that the threat of liability can have").[6]

Of course, there are other policy considerations that favor protecting prosecutors from inappropriate civil damage actions: such suits are often expensive to defend and take the prosecutor away from her duties, they may result in an unjust award, and they might even discourage a court from granting habeas corpus relief for fear of exposing a prosecutor to civil liability. *Imbler*, 424 U.S. at 424-26. However, these concerns do not themselves justify absolute immunity. As explained by Justice White in his *Imbler* concurrence:

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[6] At the same time, the requirement that any violation be of "clearly established statutory or constitutional rights" to overcome qualified immunity will protect the prosecutor from liability for inadvertent misconduct near the margins. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985)("the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints . . . . We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law").

> [T]hese adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials and must necessarily have been rejected by Congress as a basis for absolute immunity under 42 U.S.C. §1983, for its enactment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question.

424 U.S. at 436-37 (footnote omitted).

There is yet another important policy reason for limiting prosecutors to qualified immunity in connection with their investigatory responsibilities. As demonstrated by the present case, prosecutors frequently work closely with the police or other law enforcement agencies in the investigation of crimes. *See* Ind. Code §35-41-1-17 (Burns Supp. 1989)(defining "law enforcement officer" to include prosecuting attorneys and their deputies). In fact, in many cases the prosecutor is not only the state's advocate in court, but also its chief investigative officer. As a result, the police frequently act in accordance with guidance or directives from the prosecutor's office in conducting their investigations. It would be illogical and ironic to provide the police officers who followed the



prosecutor's instructions with only qualified immunity, while absolutely insulating the prosecutor who issued the instructions from any liability at all.[7] What this Court said of high, federal executive branch officials in *Butz v. Economou*, 438 U.S. 478, is thus equally true of prosecutors who direct criminal investigations:

> The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects -- including some which may infringe such important personal interests as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct.

*Id.* at 505-06.

In the wake of *Imbler*, the circuit courts have repeatedly been called upon to resolve cases raising the issue of prosecutorial immunity for conduct outside of the courtroom. While they have disagreed about where the line should be drawn, the courts of appeals have uniformly held that prosecutors are entitled to only qualified immunity for their investigatory or administra-

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[7] In fact, such a structure of immunities would place the victim of a constitutional violation in an immunity Catch 22: the prosecutor would be absolutely immune from liability, while the police officer would be able to demonstrate her good faith, and thus her entitlement to qualified immunity, by demonstrating that she abided by the prosecutor's directives.

tive conduct. *See, e.g., McSurely v. McClellan*, 697 F.2d 309, 318-19 (D.C.Cir. 1982); *Werle v. Rhode Island Bar Ass'n*, 755 F.2d 195, 198-99 (1st Cir. 1985); *Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1214-15 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981); *Allen v. Lowder*, 875 F.2d 82, 85 (4th Cir. 1989); *Marrero v. City of Hialeah*, 625 F.2d 499, 503-10 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *Joseph v. Patterson*, 795 F.2d 549, 553-55 (6th Cir. 1986); *Henderson v. Lopez*, 790 F.2d 44, 45-46 (7th Cir. 1986); *Smith v. Updegraff*, 744 F.2d 1354, 1364 (8th Cir. 1984); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203-04 (9th Cir. 1989); *England v. Hendricks*, 880 F.2d 281, 285 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1130 (1990); *Marx v. Gumbinner*, 855 F.2d 783, 789 (11th Cir. 1988).

This Court has addressed the issue of the immunity of a prosecutorial authority for investigative conduct in only one, relatively unique context. In *Mitchell v. Forsyth*, 472 U.S. 511, a 4-3 majority of the Court ruled that the Attorney General of the United States was entitled to only qualified immunity for authorizing a warrantless wiretap. Because Attorney General Mitchell asserted that the wiretap was employed for national security purposes, and was not intended to facilitate any prosecutorial decision or further any criminal investigation, that decision did not reach the question of immunity for prosecutorial investigatory conduct. But the justifications for granting qualified as opposed to absolute immunity for such conduct apply with equal force to a prosecutor's investigatory functions. Therefore, *amici* urge this Court to limit the protection afforded a prosecutor in those activities to qualified immunity.



## III. THE LINE BETWEEN PROSECUTORIAL AND INVESTIGATORY CONDUCT SHOULD BE DRAWN SO AS TO LIMIT ABSOLUTE IMMUNITY TO FUNCTIONS UNIQUELY CARRIED OUT BY PROSECUTORS

Having determined that prosecutors should be entitled to absolute immunity "in initiating a prosecution and presenting the State's case," but to qualified immunity for their investigatory activity, the issue becomes one of drawing the appropriate line between these two categories of prosecutorial functions. In many instances, the line is not clear, because much prosecutorial conduct contains both investigative and prosecutorial elements. For example, in interviewing a witness, a prosecutor may be both gathering evidence and also evaluating the witness for potential trial testimony. In obtaining a search warrant after an indictment, a prosecutor may be both conducting a further investigation and preparing her case.

*Amici* suggest that the conduct subject to absolute immunity should be narrowly circumscribed: Prosecutors should be entitled to absolute immunity only with respect to those functions which are uniquely prosecutorial. *Cf. Forrester v. White*, 484 U.S. 219, 227 (1988)(need to "draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges").

A "uniquely prosecutorial function" test would serve several important policy goals. First, and most important, it would focus absolute immunity on core prosecutorial functions, those prosecutorial activities "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Only a prosecutor is authorized to evaluate the evidence gathered in an investigation and make the decision whether to seek an indictment; only a prosecutor can present the case to a grand jury, immunize witnesses, plea bargain with defendants,

and present the state's case at trial. These are the critical, "quasi-judicial" functions that gave rise to prosecutorial immunity at common law and that motivated this Court's decision in *Imbler*.

Second, the proposed test would result in equitable treatment of different government officials engaged in comparable conduct. As noted earlier, a prosecutor's common law immunity from malicious prosecution was based in part on the "functional comparability" between her decision to initiate a prosecution and the judgments required of judges and grand jurors. *See Imbler*, 424 U.S. at 423, n.20. Similarly, when a prosecutor engages in investigatory conduct identical to that performed by other law enforcement authorities, *i.e.*, conduct that is not "uniquely prosecutorial," she should be subject to the same exposure to liability as those authorities.

Third, the proposed test is simple and clear. Lower courts have noted, with some irony, that one of the principle purposes of absolute immunity, the ability to defeat a suit at the outset without the necessity of prolonged legal proceedings, is undermined when lengthy legal proceedings become necessary to determine whether the official conduct at issue is a function to which absolute immunity applies. *See, e.g., Burns v. Reed*, 894 F.2d 949, 954 n.3 (7th Cir. 1990). By focusing the court on a single question -- was the prosecutor engaged in a function only she could legally undertake -- the proposed test eliminates this problem, while preserving the focus on function, not status.

Finally, the "uniquely prosecutorial function" test resolves the disputes that have divided the lower courts by subjecting virtually all doubtful conduct to only qualified immunity. Under the principles of immunity developed by this Court, "qualified immunity represents the norm." *Harlow v. Fitzgerald*, 457 U.S. at 807. As this Court has repeatedly acknowledged, qualified immunity provides substantial protection for executive branch



officials. *See, e.g., Malley v. Briggs*, 475 U.S. at 341 ("[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law"); *Mitchell v. Forsyth*, 472 U.S. at 524. And absolute immunity denies a remedy to victims of constitutional violations even in the face of willful, intentional misconduct by the government official. Therefore, absolute immunity should be reserved for only those few special functions that, by nature of their critical role in our constitutional system, require heightened protection. Prosecutorial conduct that is identical to that engaged in by other law enforcement officials does not fall into that category.

## IV. THE CONDUCT OF RESPONDENT AT ISSUE IN THIS PROCEEDING WAS NOT UNIQUELY PROSECUTORIAL IN NATURE AND THUS SHOULD BE ENTITLED TO ONLY QUALIFIED IMMUNITY

Under the analysis proposed by *amici*, the final inquiry is whether the functions in which respondent engaged, giving legal advice to the police and obtaining a search warrant, were uniquely prosecutorial in nature, and thus entitled to absolute immunity. *Amici* submit that neither action was entitled to such immunity.

### A. Providing Legal Advice To Police Is Not A Uniquely Prosecutorial Function

Respondent is first accused of unconstitutional conduct in advising two police officers that they should proceed with their plan to interrogate Ms. Burns, their prime suspect, under hypnosis. The court below ruled that such conduct was entitled to absolute immunity under *Imbler*. 894 F.2d at 955.

The issue of the immunity due prosecutors for dispensing legal advice to law enforcement officials has

divided the courts of appeals. *Compare, e.g., Myers v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987)(legal advice entitled to absolute immunity), *with Benavidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983) (legal advice subject to only qualified immunity). Courts supporting absolute immunity have offered two rationales for their position: some have reasoned that such advice, at least where it relates to the existence of probable cause, is a part of the process of deciding whether to prosecute, *Marx v. Gumbinner*, 855 F.2d at 790; others, including the court below, have analogized the prosecutor's conduct to that of a judge, because in giving legal advice she is "review[ing] the facts of a given case . . . to arrive at an opinion concerning legality," *Henderson v. Lopez*, 790 F.2d at 46. The first rationale proves too much. It is hard to imagine any prosecutorial advice to the police that could not similarly be described as a preliminary part of the ultimate decision whether to initiate a prosecution. Criminal investigations are permissible only where there is probable cause to believe a crime has been committed; thus, of necessity, they are designed to help resolve the question whether to prosecute. The second rationale rests on a flawed analogy; the key to judicial absolute immunity is not simply that judges render legal decisions, but rather that they are assigned that responsibility by our criminal justice system. Prosecutors are likewise assigned the task of deciding whether to initiate prosecutions, but the rendering of legal advice to the police is not a task mandated by our judicial process.

When viewed under the proposed "uniquely prosecutorial function" test, the issue becomes much clearer. Prosecutors are not the only persons authorized to provide legal advice to law enforcement personnel. In fact, there is a growing trend for police departments, at least in America's major cities, to have their own internal legal advisers. *See* International Ass'n of Chiefs of Police, *Guidelines For a Police Legal Unit* (W. Schmidt



ed. 1972)(hundreds of police departments employ one or more fulltime police legal advisers). *See also* Ind. Code §36-8-10-10.5(e)(Burns 1981)(statute authorizing county sheriffs to appoint a "legal deputy" as an adviser). In advising the police, a prosecutor acts not in a "quasi-judicial" role, but in the guise of a general counsel. And this Court has never suggested that general counsel, even of Cabinet departments, should be entitled to a greater degree of immunity than the government officials they serve.

The court of appeals below expressed concern at the possibility that, "if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutors from fulfilling this vital obligation." 894 F.2d at 956. There is, in our view, a far greater likelihood that qualified immunity will have the beneficial effect of encouraging prosecutors to check the law before offering advice, thereby improving the quality of the advice given. This is in fact the purpose of the qualified immunity standard. Prosecutors, like other government officials,

> may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate . . . ."

*Mitchell v. Forsyth*, 472 U.S. at 524 (*quoting Harlow v. Fitzgerald*, 457 U.S. at 819; emphasis added in *Mitchell*). Thus, in advising the police, prosecutors should be entitled to only qualified immunity.

### B. Obtaining A Search Warrant Is Not A Uniquely Prosecutorial Function

Respondent is also accused of having improperly obtained a warrant to search Ms. Burns' home and automobile.[8] The court below rejected the contention that this was investigative conduct in a footnote. 894 F.2d at 955 n.6.

Again, the issue has divided the courts of appeals. For example, the D.C. Circuit has ruled that a prosecutor is entitled to only qualified immunity for the preparation of unconstitutional search and arrest warrants. *McSurely v. McClellan*, 697 F.2d 309. In a *per curiam* opinion for Judge Wald and then Judge Scalia, the court reasoned:

> Similarly, preparation of the arrest and search warrants and participation in the search and seizure are nonadvocative. They involve not the protected decision to initiate prosecution, but rather the earlier, preliminary gathering of evidence which may blossom into a potential prosecution. The latter is investigatory activity and therefore receives only qualified immunity.

*Id.* at 320.

Application of the "uniquely prosecutorial function" test supports the conclusion of the D.C. Circuit. Prosecutors are not the only government officials authorized

[8] It is unclear from the lower court opinion whether a separate claim exists relating to respondent's conduct in obtaining a warrant for Ms. Burns' arrest. If so, the analysis in this section would apply to that claim as well. As this Court stated in *Malley v. Briggs*, 475 U.S. at 344 n.6, "the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant."



to seek the issuance of a search warrant. For example, Rule 41(a) of the Federal Rules of Criminal Procedure provides that a search warrant may be requested by either "a federal law enforcement officer or an attorney for the government." The act of obtaining a search warrant is thus an essentially investigatory function which should be entitled to only qualified immunity.

The resistance of some lower courts to this conclusion can probably best be understood on the basis of the facial similarity between a judge's probable cause inquiry prior to the issuance of a warrant and later proceedings before the judge following indictment. The flaws in this analogy were exposed by this Court in *Malley v. Briggs*, 475 U.S. 335. In that case, the Court ruled that a police officer was entitled to only qualified immunity for his conduct in requesting an arrest warrant from a state judge. This Court explicitly rejected the argument that the warrant application was "intimately associated with the *judicial* phase of the criminal process":

> We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of the criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction . . . .
>
> In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe

that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present. True, an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.

*Id.* at 342-44. The "uniquely prosecutorial function" test yields the same result for prosecutors, thus furthering one of the main purposes of this Court's functional approach to immunity, that different officials engaging in comparable conduct be treated comparably.



## CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Seventh Circuit and remand this case for further proceedings in which respondent will be entitled only to the protection of qualified immunity.

Respectfully submitted,

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No. 89-1715



# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1990

CATHY BURNS,
*Petitioner,*

vs.

RICK REED,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF OF AMICUS CURIAE, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF RESPONDENT

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No. 89-1715

# In the Supreme Court

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OCTOBER TERM, 1990

CATHY BURNS,
*Petitioner,*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF OF AMICUS CURIAE, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF RESPONDENT

### INTEREST OF AMICUS CURIAE

This brief is filed with the Court pursuant to the authority of Rule 37, paragraph 3, of the Rules of the Supreme Court.[1]

The California District Attorneys Association is a non-profit, public service corporation, composed of the State's 58 elected District Attorneys, two elected City Attorneys principally engaged in the prosecution of criminal cases, and about 2,000 deputy prosecutors.

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[1]Written consent of the parties has been obtained and is enclosed as part of the package containing this brief.

The purposes of the California District Attorneys Association are, *inter alia,* to endeavor to improve the administration of criminal justice, to foster and maintain the highest ethical and professional standards of all persons engaged in the prosecution of offenses under California laws, to apply the knowledge and experience of its members in the field of criminal law to the promotion of the public good, and to promote the common welfare of the criminal justice system in areas of mutual concern such as appellate review, training, communication, public education and the equal administration of law.

The organization seeks to make known the views of prosecutors in California, and to bring before this Court their positions on matters affecting the discharge of the duties of prosecutors in their everyday work.

Crime in the United States has grown to such proportions that it is only through vigorous prosecution that our society can function. If a prosecutor cannot obtain evidence or must look over his shoulder in each case in which he is involved in order to protect himself and his family from the possibilities and uncertainties of paying legal fees and civil damages, the effectiveness of the criminal justice system may not only be reduced but it is quite possible in many instances that prosecution may not even begin.

The case at bar raises the foregoing issue and is therefore of utmost concern to the prosecutors in California. Amicus curiae believes the opinion of the Court of Appeals for the Seventh Circuit in this case contains a correct statement and application of the law of absolute



prosecutorial immunity, and further believes this brief will assist this court in reaching the correct and just decision on the questions presented.

## STATEMENT OF THE CASE

Muncie, Indiana police officers Paul Cox and Donald Scroggins were assigned to investigate a September 2, 1982, incident in which petitioner, Cathy Burns, reported that an unknown assailant entered her home and rendered her unconscious with blows to the head, and then shot her two sons while they slept. The officers' suspicions focused on Burns although in repeated statements Burns denied shooting her sons.

On September 21, 1982, the officers decided to place Burns under hypnosis and she agreed. Officer Cox had received training in hypnosis and recalled there may have been legal restrictions on hypnotizing a suspect. Officer Scroggins made a telephone call to respondent, Chief Deputy Prosecutor for Delaware County Richard Reed, because "we wanted him to give us his opinion on whether we should do that." (R:101) Reed was told Burns wanted to do the hypnosis and that the police had exhausted all leads. Scroggins explained that Burns was a "possible suspect" (R:36-7) and Cox was aware hypnosis of suspects "was questionable at best and that we wanted to ask his opinion if we should proceed or not." (R: 112) Scroggins testified Reed gave "permission" to hypnotize Burns by saying "go ahead." (R:32, 67) Cox testified Reed gave "his approval" by telling Scroggins" if we had no other avenue to explore, we might as well do that." (R:102, 113)

Burns was hypnotized and made statements which the officers believed to be admissions that she indeed had shot her sons. Reed came to the station on September 21, 1982, because a police officer called and said: "That they

needed me at the police station concerning the Cathy [Burns] case. Something had come up, and they needed some advice." (R:126)

According to Officer Cox when Reed arrived at the police station:

> A. The extent of his participation was my explaining to him what we had developed as a result of the hypnotic session and asking if he felt like we had probable cause to make that arrest. . . .
>
> Q. When you asked Mr. Reed of his opinion about probable cause, what was his response?
>
> A. Mr. Reed indicated that we probably had probable cause for the arrest.

(R:107-08, *see also* R:115)

The actual warrantless arrest was performed by Officers Scroggins and Campbell after Scroggins and Cox made the decision to arrest. (R:67-69, 72, 114)

Officer Scroggins testified he did not discuss the decision to arrest Burns with Reed stating: "That's not the policy. We arrest people. The police department arrests people. And the prosecutor's office is the one that actually files the formal charge." (R:69) Officer Cox testified:

> Q. In your conversations with Mr. Reed, had he told you that he didn't think you had probable cause, would you have still arrested her?
>
> A. Probably not.

(R:116)

Cox explained:

> Q. Why did you go to him and request his advice after the hypnotic session was over?



> A. Because he was the deputy prosecuting attorney. I am not an attorney. In situations such as we had there, I wanted to make sure he understood what we had.
>
> Q. You don't need his approval to arrest an individual, do you?
>
> A. Not necessarily, no.
>
> Q. Then why were you going to him?
>
> A. I wanted some help with it.

(R:118)

On September 22, 1982, Officer Scroggins went to the courthouse to get a search warrant for Burns' houses. Reed was told simply to appear in court and assist an officer in getting a search warrant. According to the Honorable Betty Shelton Cole, Judge of the Superior Court, the county prosecutor or one of his deputies has "the sole and exclusive power to seek a search warrant or approve the seeking of a search warrant." (R:5)[2] Scroggins and Reed had no time to talk before the probable cause hearing. During the hearing Reed elicited testimony from Officer Scroggins regarding Burns' alleged confession. At no point was Judge Cole told by Scroggins that Burns' confession was in fact his interpretation of Burns' hypnotically induced statements, nor that she had denied involvement in the assaults on numerous other occasions. Reed explained that he thought Scroggins had obtained another confession apart from the hypnosis ses-

---

[2]Judge Cole appears to be referring to local practice. Indiana law clearly allows a police officer to personally seek a search warrant without the approval or assistance of the county prosecutor. Indiana Code 35-33-5-1 et seq.

sion. The judge found there was probable cause and issued the search warrant.

On September 28, 1982, Judge Cole issued a warrant for Burns' arrest after an investigator for the Delaware County Prosecuting Attorney submitted an affidavit in support of probable cause which also failed to state that the alleged confession was obtained while Burns was under hypnosis.[3]

Criminal charges against Burns were dismissed after the state court quashed the statements made by Burns while under hypnosis.

Burns then filed a civil rights action for damages under 42 U.S.C. § 1983 in federal district court against the government officials involved in the criminal case, including respondent Reed. The claims against the other defendants were disposed of prior to trial. Burns received a settlement of $250,000. Prior to trial the district court made an in limine ruling apparently granting Reed absolute immunity as to Burns' claims relating to the arrest warrant. (R:14)

Upon the close of Burns' case in chief, Reed moved for a directed verdict pursuant to Federal Rules of Civil Procedure, Rule 50. The trial court entered a directed verdict in favor of Reed finding his activities were protected by absolute immunity.

Burns appealed to the Seventh Circuit Court of Appeals which affirmed the entry of the directed verdict also on the grounds the prosecutor's activities were protected

[3]Under Indiana law a criminal case must be filed in order to obtain an arrest warrant. Indiana code 35-33-2-1(c). California law is in accord. California Penal Code sections 813(a), 814.



by absolute immunity. *Burns v. Reed*, 894 F.2d 949 (7th Cir. 1990).

Burns petitioned this Court for writ of certiorari which was granted on June 28, 1990. See 100 S.Ct. 3269.

## SUMMARY OF ARGUMENT

Conflicts among decisions of the lower federal courts regarding the scope of absolute immunity for prosecutors have a chilling effect on the prosecutors' desire to assist law enforcement officers in fulfilling their legal duties while protecting individual constitutional rights. Prosecutors need a bright line demarcation of their immunity under federal law. The appropriate resolution is to grant absolute immunity to all but purely investigative or administrative criminal law functions of prosecutors. In particular, prosecutors should not be held liable for simply giving legal advice to law enforcement officers. Absolute immunity should extend to giving legal advice, including advice as to the existence of probable cause to arrest. Absolute immunity should extend to prosecutors who seek or assist in obtaining search warrants even if this is accomplished by intentionally or recklessly providing false or misleading information to the magistrate.

## ARGUMENT
## I

## CONFLICTS BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO THE SCOPE OF IMMUNITY FOR PROSECUTORS INVOLVED IN PREFILING ACTIVITIES SHOULD BE RESOLVED IN FAVOR OF GRANTING ABSOLUTE IMMUNITY TO ALL BUT PURELY INVESTIGATIVE OR ADMINISTRATIVE PROSECUTORIAL FUNCTIONS.

This Court has recognized two kinds of government official immunity to federal civil suits for damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Most officials are entitled to qualified or good faith immunity, but for officials whose special functions or constitutional status require complete protection from suit the Court has recognized the defense of absolute immunity. *Id.* The Court's analysis has generally followed a "functional" approach to immunity law, recognizing that the judicial, prosecutorial, and legislative functions require absolute immunity. *Forrester v. White*, 484 U.S. 219, 224 (1988); *Harlow*, at 810-11. Absolute immunity does not flow from rank or title or location within the government, but from the nature of the responsibilities of the individual official. *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985).

The societal costs of permitting lawsuits for damages against governmental officials and justifying absolute immunity include the diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office, and fear that being sued may dampen the ardor of all but the most resolute or the most irresponsible in the unflinching discharge of their duties. *Harlow v. Fitzgerald*, 457 U.S. at 814. Additional reasons for according official immunity include the inequity of exposing officials to vicarious liability for the acts



of subordinates, the notion that government servants owe a duty to the public rather than to the individual, and that official accountability is more appropriately enforced through the ballot and in criminal or removal proceedings than in private civil suits. *Gray v. Bell*, 712 F.2d 490, 496-97 (D.C. Cir. 1983); *cert. denied*, 465 U.S. 1100 (1984); *Robichaud v. Ronan*, 351 F.2d 533, 535-36 (9th Cir. 1965).

Absolute immunity is essential to protect the integrity of the judicial process despite any informality with which the judge proceeds and despite any ex parte feature of the proceeding. *Forrester v. White*, 484 U.S. at 227; *Cleavinger v. Saxon*, 474 U.S. at 200. This immunity for judges is absolute even when the judge is accused of acting maliciously and corruptly, and is for the benefit of the public, whose interest it is that judges be free to exercise their functions with independence and without fear of consequences. *Imbler v. Pachtman*, 424 U.S. 409, 418, n.12 (1976).

There are several factors characteristic of the judicial process which are considered in determining whether to extend absolute as opposed to qualified immunity to those involved in the judicial process, including:

1) The need to assure that the individual can perform his function without harassment or intimidation;

2) The presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

3) Insulation from political influence;

4) The importance of legal precedent;

5) The adversary nature of the process; and

6) The correctability of error on appeal.

*Cleavinger v. Saxon*, 474 U.S. at 202, citing *Butz v. Economou*, 438 U.S. 478, 512 (1978).

At common-law the absolute immunity extended to judges and grand jurors was also extended to prosecutors in what is known as quasi-judicial immunity. *Imbler v. Pachtman*, 424 U.S. at 422-23 and n.20. In *Imbler* this Court determined that the same considerations of public policy that underlie the common-law rule also countenance absolute immunity for prosecutors from civil rights suits under 42 U.S.C. § 1983. *Id.*, 424 U.S. at 424. The Court cited some of these public policy considerations such as:

1) Loss of public trust in the prosecutor's office if every decision was constrained by fear of potential civil liability for damages;

2) Likelihood disgruntled defendants would use such suits for revenge or retaliation;

3) Diversion of the prosecutor's energy and attention from the pressing duty of enforcing the criminal law;

4) Complexity of the legal issues regarding liability would often require a virtual retrial of the criminal offense in the civil forum by lay jurors without technical expertise;

5) The intolerable burden of requiring a prosecutor to defend, often years later, actions necessarily taken under serious constraints of time and information; and

6) Reluctant prosecutors might not file close cases or those with sharp conflicts of evidence rather than take an appropriate stance of permitting a jury to resolve the conflict.



*Id.* at 424-26. The Court noted numerous safeguards are already in place to deter or remedy prosecutorial misconduct, including scrutiny of filed cases by trial and appellate judges, criminal liability, and professional discipline by an association of peers. *Id.* at 427-29. Another safeguard is that the prosecutor's superiors or appointing authority can remove the prosecutor for abuse of position. *Henderson v. Lopez*, 790 F.2d 44, 47 (7th Cir. 1986); *see generally Morrison v. City of Baton Rouge*, 761 F.2d 242, 246, n.3 (5th Cir. 1985).

The decision in *Imbler* was limited to the quasi-judicial prosecutorial functions of initiating a prosecution and in presenting the State's case. 424 U.S. at 430-31. The Court stated: "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.* The Court explained further in footnote:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as

> an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

*Id.* at 431, n.33.

Even before *Imbler* some courts of appeal had refused to extend absolute immunity to prosecutorial investigative conduct anticipating the distinction drawn in *Imbler*. See *Robichaud v. Ronan,* 351 F.2d at 536-37. After *Imbler* the courts of appeal generally ruled prosecutors do not enjoy absolute immunity for acts taken in administrative or investigative roles. *Harlow v. Fitzgerald,* 457 U.S. at 811, n.16. The Court has acknowledged it has implicitly drawn the same distinction in *Butz v. Economou,* 438 U.S. at 515-17. *Id.* However, the courts of appeal have indeed found it difficult to apply the functional test in determining whether specific prosecutorial activities are quasi-judicial enjoying absolute immunity. *Imbler v. Pachtman,* 429 U.S. at 431, n.33; *Gray v. Bell,* 712 F.2d 490, 499. Cases describe the "gray area" between quasi-judicial, investigative and administrative functions relating to the initiation of a prosecution. *Joseph v. Patterson,* 795 F.2d 549, 554 (6th Cir. 1986), *cert. denied,* 481 U.S. 1023 (1987); *Forsyth v. Kleindienst,* 599 F.2d 1203, 1215 (3rd Cir. 1979), *cert. denied,* 453 U.S. 913 (1981). The dilemma was pinpointed in *Marx v. Gumbinner,* 855 F.2d 783 (11th Cir. 1988) in which the Court of Appeals for the Eleventh Circuit noted the goal is to determine absolute immunity as early as possible, yet the dividing line for prosecutors remains "amorphous, and the process of determining on which side of the line particular kinds of conduct fall has proceeded on a case-by-case basis." At 788-89.

Only the vaguest of tests have been devised. For instance, the Court of Appeals for the District of Columbia in *Gray v. Bell,* 712 F.2d 490 set forth two general



categories of factors to take into consideration. First, the court considered whether the prosecutor's conduct was "sufficiently adversarial" to justify absolute immunity. *Gray,* 712 F.2d at 500. The court in *Joseph v. Patterson,* 795 F.2d at 554 used the term "advocatory" as a synonym for "quasi-judicial." Among the factors considered here by the court in *Gray* were the particularity of the proceeding "in terms of focusing on a specific target, the "context of the conduct" in terms of formality, and the "nature of particular prosecutorial actions or decisions" in relationship to "traditional quasi-judicial functions." 712 F.2d at 500-01. The second category of factors are the safeguards available to "minimize the necessity for civil damage suits." *Id.* at 501. Here mentioned was the level of judicial scrutiny, availability of trial sanctions and professional discipline. *Id.*

The circuit courts of appeal decisions attempting to draw the cutoff line of absolute immunity for the prosecutor's varied prefiling activities are mixed and sometimes contradictory. A good compilation of case decisions can be found in *Myers v. Morris,* 810 F.2d 1437, 1446-47 (8th Cir. 1987), *cert. denied,* 484 U.S. 823 (1987). Some examples are cited below.

Cases have not extended absolute immunity to prosecutors who participate in the execution of a warrantless search. *Fullman v. Graddick,* 739 F.2d 553, 559 (11th Cir. 1984). There is no absolute immunity for investigative wiretaps, unless the wiretap is for "securing of information . . . necessary to a prosecutor's decision to initiate a criminal prosecution." *Forsyth v. Kleindienst,* 599 F.2d at 1215; *cf. Jacobson v. Rose,* 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied,* 442 U.S. 930 (1979).

A prosecutor does not have absolute immunity when entrapping a suspect. *Mullinax v. McElhenney,* 817 F.2d

711, 715 (11th Cir. 1987). However, the prosecutor is immune when threatening criminal prosecution, *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982), or conspiring to prosecute for a crime that never occurred. *Rachuy v. Murphy Motor Freight Lines, Inc.*, 663 F.2d 57, 58 (8th Cir. 1981).

Absolute immunity has been denied for prosecutorial activities such as interviewing crime victims and witnesses as part of the initial investigation. *Robison v. Via*, 821 F.2d 913, 920 (2nd Cir. 1987) (No absolute immunity for child abuse investigation). However, absolute immunity is extended to prosecutor who questions child abuse victims as part of their prosecutorial responsibility to decide who to charge and how to present the case. *Myers v. Morris*, 810 F.2d at 1448-51. Absolute immunity also applies to a prosecutor who confers with witnesses allegedly to induce perjurious testimony. *Rose v. Bartle*, 871 F.2d 331, 343-45 (3rd Cir. 1989) (Before grand jury); *Demery v. Kupperman*, 735 F.2d 1139, 1143-44 (9th Cir. 1984) (Before professional disciplinary hearing), *cert. denied*, 469 U.S. 1127 (1985).

The conflict of philosophies in the cases interpreting *Imbler* is evident. In *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), the Court of Appeals for the Fifth Circuit stated "a prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities." *Id.* at 505. The Court of Appeals for the Ninth Circuit has held, however, "that absolute prosecutorial immunity attaches to the actions of a prosecutor if those actions were performed as part of the prosecutor's preparation of his case, even if



they can be characterized as 'investigative' or 'administrative.'" *Demery v. Kupperman*, 735 F.2d at 1143.

Some of these conflicts are ripe for decision in the instant case. Amicus curiae, the California District Attorneys Association, urges the Court to grant absolute immunity to prosecutors to the fullest extent possible consistent with the principles and policies set forth in the Court's prior decisions such as *Imbler v. Pachtman*. The appropriate dividing line is to grant absolute immunity to all prosecutorial activities regarding criminal cases, including those functions occurring prior to initiating formal proceeding, which are not purely investigative or administrative.

## II

## PROSECUTORS ARE ENTITLED TO ABSOLUTE IMMUNITY WHEN GIVING LEGAL ADVICE TO INVESTIGATING POLICE AGENCIES.

The court of appeals in this case ruled "that a prosecutor is absolutely immune from suit when acting as a legal advisor to police officers." *Burns v. Reed*, 894 F.2d 949, 955 (7th Cir. 1990). However, absolute immunity ends if the prosecutor "actually participates in investigative conduct." *Id.* at 956. The court of appeals acknowledged that as to the former rule there was a conflict of opinion among the circuits. *Id.* at 955 and n.5.

One distinction flows from the relationship between the prosecuting agency and the policy agency. For instance, the United States Attorney General has statutory duties far greater than those of the ordinary prosecutor, including supervising the Federal Bureau of Investigation. 28 U.S.C. § 531; *Forsyth v. Kleindienst*, 599 F.2d at 1212 and n.10. As this Court has pointed out, it makes little sense

to hold the subordinate agent liable for illegal conduct but afford immunity to the official of a higher rank who orders the action. *Butz v. Economou*, 438 U.S. at 506. However, this reasoning should not apply when the prosecuting agency has no direct control or supervisory powers over the investigating agency.

The Seventh Circuit's approach is correct. When the prosecutor's only relationship to the police is that of legal advisor the prosecutor is absolutely immune when so advising a police officer. *Burns v. Reed*, 894 F.2d at 955; *Henderson v. Lopez*, 790 F.2d at 47. There are substantial similarities between the traditional prosecutorial function of initiating and handling criminal cases and giving legal advice to police officers regarding potential criminal cases. *Henderson*, 790 F.2d at 47. Thus giving legal advice is properly characterized as a quasi-judicial function. *Id.*

The Tenth Circuit has granted only qualified immunity to prosecutors who offer legal advice to law enforcement agencies. *Wolfenbarger v. Williams*, 826 F.2d 930, 937 (10th Cir. 1987); *Benavidez v. Gunnell*, 722 F.2d 615, 616-617 (10th Cir. 1983). However, the issue is scarcely discussed in *Benavidez* as the Court ultimately dismissed the plaintiff's case on the basis of qualified immunity. 722 F.2d at 618. *Wolfenbarger* merely followed *Benavidez* on the basis of stare decisis. 826 F.2d at 937. Neither case offers the same depth of reasoning as the Seventh Circuit cases.

Ironically the Tenth Circuit's approach puts virtually the entire burden of liability on the prosecutor who offers legal advice to the police officer. The Tenth Circuit holds that where the law is unclear the police officer is immune if the officer consulted with and relied upon the advice of a prosecuting attorney. *England v. Hendricks*, 880 F.2d 281, 284 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1130



(1990); *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). At the same time the Tenth Circuit is encouraging police to seek advice in close cases, it is discouraging prosecuting attorneys from giving such advice. Absolute immunity for prosecutors will encourage police officers to seek advice before they act. The greatest protection against constitutional rights violations is prevention, not after the fact civil suits for damages.

As outlined in *Burns v. Reed* and *Henderson v. Lopez* there is strong justification for characterizing the prosecutor's function of giving legal advice to law enforcement officers as quasi-judicial and thus entitled to absolute immunity.

First, the prosecutor relies on representations about the facts from the police officer when giving advice just as he does when deciding whether to accept or reject a case for prosecution. The prosecutor seldom has the time or resources to check the accuracy or completeness of the information upon which his legal decision rests. By its very nature the giving of legal advice cannot be defined as an investigative function.

Second, the prosecutor is giving a legal opinion based on his training and experience in the law. When advising the police as to legality of their proposed conduct the prosecutor is making the same sort of legal decision prosecutors make every day when functioning as the initiator and advocate of a State's case against an individual.

The police seek out the prosecutor for advice instead of general counsel for their governmental entity (i.e., the city attorney or county counsel) because the prosecutor works in the criminal courts daily and generally has a

better grasp of the legal rules governing the criminal justice system. Also the prosecutor's office, if not that same prosecutor, is often the one who will make the determination whether the police officer followed the law and has presented a viable case for filing.

Even when not required by law, prosecutors often freely offer legal advice to police officers who ask for it. The motivation of the prosecution is not to be part of the investigation or arrest, but to make sure that the police do not take actions which jeopardize the chances of successfully prosecuting any resulting criminal case. Thus the prosecutor is willing to offer advice because of its direct relationship to his quasi-judicial function of determining which cases to prosecute and his quasi-judicial function of "obtaining, reviewing and evaluating" evidence before trial. *Imbler*, 424 U.S. at 432, n.34.

Third, a police officer's questions about the legality of his proposed conduct are the same type of issues faced by judges and lawyers in their everyday week. That the prosecutor renders the advice outside court and prior to the filing of a case should not be fatal to a grant of absolute immunity. Nor should the fact that the prosecutor shares the desire of the police to enforce the criminal laws to the fullest extent within the limitations of the constitution. The prosecutor's advice is most often sought in close cases. The public interest must be to have a prosecutor who will make the close call impartially and undeterred by threat of vexatious litigation. The public interest in solving crimes and prosecuting criminal cases with the strongest caliber of evidence necessitates that police sometimes act in the gray areas between constitutional rights. Without absolute immunity prosecutors may well choose not to lend advice to an officer who has enough sense to seek such advice.



Instead law enforcement would be faced with several much less satisfactory alternatives. The officer might hesitate to take even legal action and by doing so lose valuable evidence. The officer might simply act out of ignorance and endanger individual constitutional rights needlessly. If available the officer might seek legal advice from other county legal officials whose primary job is to prevent and defend civil lawsuits. Insuring the availability of expert legal advice from those intimately familiar with criminal law and procedure is one of the main reasons for granting absolute immunity to prosecutors. One other alternative is the costly prospect of police agencies, big and small, having to hire their own lawyers and legal advisors despite the existence of otherwise readily accessible and knowledgeable public prosecutors.

Another decision of concern to amicus is *Marrero v. City of Hialeah*, 625 F.2d 499. The Fifth Circuit Court of Appeals in *Marrero* indicated it was not considering "the degree of immunity to which a prosecutor would be entitled if he merely gave legal advice from his office in response to specific inquiries from police officers." *Id.* at 505-506, n.8. The prosecutor in *Marrero* merely accompanied police on the execution of a search warrant and apparently "conferred" with police during the search. There was no allegation that the prosecutor participated in or had any supervisory authority over the search warrant execution. The court granted only qualified immunity. *Id.* at 510. *Marrero* seems to characterize the prosecutor as participating in the investigation simply because he gave legal advice to the police at the scene rather than on the telephone or from the prosecutor's office. There is no justification for such distinction. This arbitrary distinction ignores the modern trend of prosecutors working more closely with law enforcement to make sure the end product of the investigative effort is a solid

criminal prosecution. Rather than offering legal advice behind a desk on matters of immediate police concern some prosecuting agencies, like the San Diego County District Attorney's Office, have created separate divisions of lawyers specializing in particular areas, such as gangs or narcotics, who often go to crime scenes and are available to offer advice to police 24 hours a day. The advantages of this greater level of cooperation are many, but key to the issue at hand is that it is far more likely that the constitutional rights of individuals will be protected rather than abused when the prosecutor is available and willing to lend advice.

There is an entirely different approach to the issue of liability when a prosecutor lacking supervisory authority over the police merely gives legal advice to an officer. Since the officer is merely seeking guidance and is free to accept or reject the advice given there is insufficient causal connection under 42 U.S.C. § 1983 to hold the prosecutor liable. Regardless of the Court's ruling on the issue of immunity, the Court should hold that as a matter of law the proximate cause element of 42 U.S.C. § 1983 requires more than merely giving advice to the public official who acts illegally.

A section 1983 cause of action is premised on the requirement that the governmental official's actions "subjects, or causes to be subjected" a citizen to contitutional deprivation. Thus, causation is an essential element of a section 1983 cause of action. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355-56 (9th Cir. 1981). The plaintiff must establish proximate or legal causation. *Arnold*, 637 F.2d at 1355. In order to maintain a section 1983 action the "plaintiff must specifically allege a *direct* causal link between some official conduct . . . and the alleged constitutional deprivations." *Fialkowski v. Shapp*, 405 F. Supp. 946, 950 (D.C. Pa. 1975) emphasis added; *see also Prochaska v. Fediaczko*, 473 F. Supp. 704, 708 (D.C. Pa. 1979). Lacking personal participation the official is not liable under section 1983. *Prochaska*, 473 F. Supp. at 707; *Kreutzer v. County of San Diego*, 153 Cal.App.3d 62, 70-71, 200 Cal.Rptr. 322 (1984). Allegations of mere encouragement of unconstitutional action are insufficient. *Durkin v. Bristol Tp.*, 88 F.R.D. 613, 615 (D.C. Pa. 1980).



This Court has held that a governmental agency cannot be found liable under section 1983 for acts of individual employees unless the injury is inflicted pursuant to an official governmental policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-94 (1978). The Court stated: "Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.* at 692.

*Monell* was applied to the county prosecutor's office by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur* the Sheriff's Department requested legal assistance from the county prosecutor not just in the form of legal advice, but under a particular Ohio statutory scheme which in effect delegated the final decisionmaking authority to the prosecutor. Therefore, the Court held the prosecutor's advice established county policy under *Monell* subjecting the county prosecutor to liability under section 1983. *Id.* at 485. However, the Court indicated it "might be inclined to agree" that no liability attached to the county prosecutor if the individual prosecutors merely rendered "legal advice." *Id.* at 484. *Pembaur* did not

involve the liability or immunity of the individual prosecutor. *Id.* at 474, n.2.

Applying these principles to the case at hand it is clear respondent Reed had no supervisory or policymaking authority over the conduct of the Muncie Police Department. As county prosecutor his only function was to provide legal advice to the local law enforcement agency. Based on a short synopsis of the situation by Officer Scroggins, Reed gave his legal opinion as to propriety of hypnotizing appellant Burns. While the officers characterized Reed's actions as giving "approval" or "permission," the underlying facts clearly show that the decision rested not with Reed but with the police. The fact Reed gave his legal opinion from home after working hours rather than from his office should not strip him of absolute immunity. The trial and appellate courts below properly granted absolute immunity to respondent.

In addition, there is insufficient evidence that respondent's act of giving legal advice was the direct cause of the alleged impropriety. Reed did not personally participate in the hypnosis or related investigatory actions of the police. Lacking personal participation or supervisory responsibility over the police, Reed should not be held liable under section 1983.

## III

## PROSECUTORS SHOULD BE AFFORDED ABSOLUTE IMMUNITY WHEN GIVING LEGAL ADVICE TO LAW ENFORCEMENT OFFICERS AS TO THE EXISTENCE OF PROBABLE CAUSE TO ARREST.

A separate but closely related issue to that of whether prosecutors should have absolute immunity when giving



legal advice is whether prosecutors should have absolute immunity when giving legal advice as to the existence of probable cause to arrest. Regardless of the Court's conclusion as to the former issue, the latter issue discussed here presents an even stronger justification for absolute immunity.

In addition to the Seventh Circuit cases extending quasi-judicial immunity to prosecutors giving legal advice generally, other circuits considering the question of legal advice regarding probable cause to arrest have granted absolute immunity. In *Myers v. Morris*, 810 F.2d 1437, the prosecutor opined that based on the facts related to her there was probable cause to arrest and charge. The Court of Appeals for the Eighth Circuit concluded the prosecutor had absolute immunity when performing this function. *Id.* at 1448. "We hold that in providing advice to law enforcement officials concerning the existence of probable cause and the prospective legality of arrests, Morris was functioning in a quasi-judicial capacity as a prosecutor initiating the formal judicial process." *Id.*

The Eleventh Circuit in *Marx v. Gumbinner* declined to rule on extending absolute immunity to legal advice in general. 855 F.2d at 790, n.13. However, the circuit court did "hold that absolute immunity adheres where, as here, the act complained of is that of rendering legal advice to police officers concerning the existence of probable cause to make an arrest." *Id.* at 790.

The basic rationale of these opinions is that the decision whether probable cause exists is a key part of the prosecutor's quasi-judicial function of initiating a prosecution to which absolute immunity clearly adheres. *Marx*, 855 F.2d at 790; *Myers*, 810 F.2d at 1448. Not only does absolute immunity attach to the decision to initiate prosecution, it attaches to the decision not to initiate prosecu-

tion. *Barrett v. United States*, 798 F.2d 565, 572 (2nd Cir. 1986); *Morrison v. City of Baton Rouge*, 761 F.2d at 248. Therefore, the prosecutor should be absolutely immune for any advice he gives to law enforcement on the question of probable cause to arrest or the related legalities of an arrest.

Turning to the present case it is clear that respondent Reed did not personally participate in the arrest of appellant Burns. Reed was asked his opinion by the police who were free to accept or reject the advice. As Officer Scroggins, who actually made the arrest, succinctly explained, "The police department arrests people. And the prosecutor's office is the one that actually files the formal charges." (R:69) As Officer Cox stated, the police did not need Reed's approval to arrest. (R:118) It is irrelevant that under Indiana law a prosecutor has the same power to arrest as any law enforcement officer (Indiana 35-31-1-1 and 35-41-1-17) because Reed did not make the arrest in this case.

From respondent Reed's position as prosecutor he was simply making a legal decision whether, based on the facts as described by the officers, there was probable cause to arrest. This decision was inextricably tied to his role as prosecutor to determine whether there was sufficient evidence to initiate a criminal filing. When functioning as the gatekeeper over which cases will be prosecuted in the criminal courts, a prosecutor, such as respondent in this situation, is fulfilling a quasi-judicial role for which absolute immunity clearly adheres. *Imbler*, 424 U.S. at 431. The trial and appellate courts properly granted absolute immunity to respondent when he advised the police as to the existence of probable cause to arrest appellant Burns.



## IV

## PROSECUTORS SHOULD BE AFFORDED ABSOLUTE IMMUNITY WHEN SEEKING A SEARCH WARRANT.

This case presents the issue whether a prosecutor should be granted absolute immunity when seeking or assisting a police officer who applies for a search warrant even if the application is based on intentionally or recklessly false or misleading information. The Court has indicated a judge or magistrate is protected by absolute immunity when issuing search warrants. *Stump v. Sparkman*, 435 U.S. 349, 363, n.12 (1978). A prosecutor who advocates for issuance of such a warrant should also be granted absolute immunity.

The circuit courts have drawn a distinction between whether the search warrant is sought for purely investigative purposes or whether it is part of the prosecutor's attempt to gather evidence in order to make an informal judgment whether to initiate a prosecution. *Joseph v. Patterson*, 795 F.2d at 556; *see also Rex v. Teeples*, 753 F.2d 840, 845-46 (10th Cir. 1984) (dissent of Justice Barrett), *cert. denied*, 474 U.S. 967 (1985). In *Joseph* the plaintiffs alleged the prosecutors obtained a search warrant for evidence relating to criminal charges filed by a citizen which the prosecutors knew were false. The Sixth Circuit Court of Appeals found this conduct fell in the "gray" area of immunity analysis because it displayed characteristics of both advocatory and investigatory functions. 795 F.2d at 556. The court remanded the case for further factual inquiry, but noted: "Clearly, decisions of when and how to prosecute are not made in a vacuum, so that in some cases the directing of police to secure further evidence may be necessary to and part of a decision to prosecute." *Id.* If done as part of the decision whether or

not to prosecute a case, the obtaining of a search warrant becomes a quasi-judicial function and the prosecutor is entitled to absolute immunity. *Id.*

A similar ruling was made in *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988), involving a wiretap warrant. The court remanded for further factual inquiry as to whether the applications for the wiretap warrants, allegedly based on false affidavits, were purely investigative or prosecutorial in nature. *Id.* at 77. (*Dist. Jacobson v. Rose*, 592 F.2d 515, 524 — warrant authorized wiretapping by the District Attorney's Office.)

In contrast, in *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982), *cert. denied*, 474 U.S. 1005 (1985), the court determined there should be no absolute immunity for a prosecutor who prepares an arrest or search warrant flagrantly lacking probable cause. *Id.* at 319. The court stated:

> Similarly, preparation of the arrest and search warrants and participation in the search and seizure are nonadvocative. They involve not the protected decision to initiate prosecution, but rather the earlier, preliminary gathering of evidence which may blossom into a potential prosecution. The latter is investigatory activity and therefore receives only qualified immunity.

*Id.* at 320.

However, in *Gray v. Bell*, 712 F.2d 490, the District of Columbia Circuit Court of Appeals appears to have expanded its view of evidence gathering as quasi-judicial, absolutely protected activity. In *Gray* the court held that a prosecutor's investigatory actions in preparation for grand jury proceedings which had "focused on a particular suspect or crime" were entitled to absolute immunity. *Id.* at 503-04.



In the State of California a search warrant can be obtained for a number of reasons not all of which necessarily contemplate a criminal prosecution. California Penal Code section 1424. Thus the distinction drawn between search warrants obtained for purely investigative purposes and those sought to assist the prosecutor in "obtaining, reviewing and evaluating" evidence in preparation for initiating a criminal case is valid. The prosecutor is entitled to absolute immunity as to the latter function. *Imbler*, at 431, n.33.

However, as illustrated by the present case, a further distinction needs to be drawn based on the nature of the prosecutor's participation in obtaining the search warrant. It is generally law enforcement agents who initiate the request for a search warrant. It is the officer who generally takes the oath before testifying or signs the affidavit under penalty of perjury before presenting it to the magistrate. The officer goes to the prosecutor for legal advice and assistance as to the factual and technical sufficiency of the warrant application. As discussed previously, the act of giving such legal advice should not subject the prosecutor to liability under section 1983. The prosecutor may go further and help present the affidavit or testimony of the police officer to the magistrate. Although done ex parte and informally this is clearly an in-court advocacy function for which the prosecutor should be granted quasi-judicial immunity. It is only when the prosecutor assumes the role of affiant or witness that he steps out of the prosecutorial role.

In the instant case petitioner's factual record was complete. It shows that the search warrant was obtained after petitioner was arrested and the determination

whether to initiate prosecution was imminent. The warrant was not sought for purely investigative purposes, but focused on a particular crime and a particular suspect as well as particular items of evidence for use during the prosecution. Thus respondent Reed is entitled to the protection of absolute immunity for his participation in obtaining the search warrant for petitioner's home.

In addition, respondent Reed should be granted absolute immunity because his participation in obtaining the search warrant was limited to questioning Officer Scroggins under oath before Judge Cole. This mirrored the traditional prosecution function of presenting witnesses and advocating legal matters before a court to which quasi-judicial immunity clearly applies. Impliedly conceding the weakness of her position petitioner attempts to characterize respondent Reed's leading form of questioning Officer Scroggins as Reed actually testifying. (Brief of Petitioner, at 22.) It was Officer Scroggins' answers under oath which the judge relied on to issue the warrant. Officer Scroggins was specifically asked by respondent Reed: "Is there anything else you'd like to tell the Judge about that?" and Scroggins answered "no." (Petition for Certiorari, Appendix C, 21a.) It was clearly Scroggins who misled the judge. There can be no legitimate question here that respondent Reed maintained his role as prosecutor and advocate during the probable cause hearing for the search warrant. Reed is entitled to quasi-judicial immunity when performing this function.

Appellant confuses the requirement that an Indiana prosecutor seek or approve any search warrant (R:5) with the lack of such requirement when an arrest warrant is presented (R:15-16). (Brief of Petitioner, at 5.) Under the "uniquely prosecutorial function" test proposed in the Amicus Brief by the American Civil Liberties Union



respondent Reed is entitled to absolute immunity because Judge Cole's trial testimony is clear that the Indiana county prosecutor's office has "the sole and exclusive power to seek a search warrant or approve the seeking of a search warrant." (R:5)[4] In any event the ACLU test ignores the previously described benefits of encouraging police and prosecutor consultation before the police act. In their zeal to find someone to sue after an alleged violation, the ACLU position in practice would increase the risk of unconstitutional police conduct. The Court is urged to reject the ACLU position.

---

[4]But see footnote 2, *supra*.

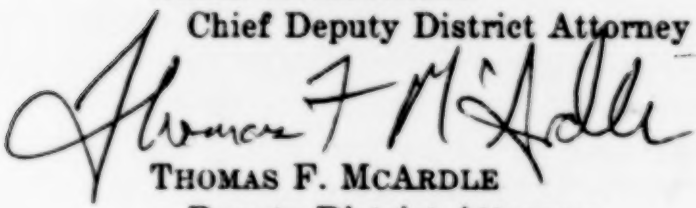
## CONCLUSION

Based on the foregoing arguments and authorities, amicus, the California District Attorneys Association, respectfully requests that this Court extend the protection of absolute immunity to public prosecutors engaged in prefiling activities relating to the initiation of criminal prosecutions by affirming the decisions of the trial and lower appellate courts in this case.

Dated:

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney of the County
of San Diego
BRIAN E. MICHAELS
Chief Deputy District Attorney



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# APPENDIX OF STATUTORY PROVISIONS

California Penal Code section 813 states in part:

> (a) When a complaint is filed with the magistrate charging a public offense originally triable in the superior court of the county in which he or she sits, if the magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, the magistrate shall issue a warrant for the arrest of the defendant, except that, upon the request of the prosecutor, a summons instead of an arrest warrant shall be issued; provided, that a judge of the justice court who is not a member of the State Bar may issue such a warrant or summons only upon the concurrence of the district attorney of the county in which he or she sits or the Attorney General.

California Penal Code section 814 states:

> A warrant of arrest issued under Section 813 may be in substantially the following form:
>
> County of _____
>
> The people of the State of California to any peace officer of said State:
>
> Complaint on oath having this day been laid before me that the crime of _____ (designating it generally) has been committed and accusing _____ (naming defendant) thereof, you are therefore commanded forthwith to arrest the above named defendant and bring him before me at _____ (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at _____ (place) this _____ day of _____, 19__.

_____

(Signature and full official title of magistrate.)

California Penal Code section 1424 states in part:

(a) A search warrant may be issued upon any of the following grounds:

(1) When the property was stolen or embezzled.

(2) When the property or things were used as the means of committing a felony.

(3) When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing its being discovered.

(4) When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

(5) When the property or things to be seized consist of evidence which tends to show that sexual exploitation of a child, in violation of Section 311.3, has occurred or is occurring.

Indiana Code 35-33-2-1 states:

Sec. 1. (a) Except as provided in chapter 4 of this article, whenever an indictment is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court, without



making a determination of probable cause, shall issue a warrant for the arrest of the defendant.

(b) Whenever an information is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court shall issue a warrant for the arrest of the defendant after first determining that probable cause exists for the arrest.

(c) No warrant for arrest of a person may be issued until:

(1) an indictment has been found charging him with the commission of an offense; or

(2) a judge has determined that probable cause exists that the person committed a crime and an information has been filed charging him with a crime.

Indiana Code 35-33-5-1 states:

Sec. 1. (a) A court may issue warrants only upon probable cause, supported by oath or affirmation, to search any place for any of the following:

(1) Property which is obtained unlawfully.

(2) Property, the possession of which is unlawful.

(3) Property used or possessed with intent to be used as the means of committing an offense or concealed to prevent an offense from being discovered.

(4) Property constituting evidence of an offense or tending to show that a particular person committed an offense.

(5) Any person.

(6) Evidence necessary to enforce statutes enacted to prevent cruelty to or neglect of children.

(b) As used in this section, 'place' includes any location where property might be secreted or hidden, including buildings, persons, or vehicles.

Indiana Code 35-33-5-2 states:

Sec. 2. (a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit, particularly describing the house or place to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to be arrested committed the offense, and setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause. When based on hearsay, the affidavit must either:

(1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or

(2) contain information that establishes that the totality of the circumstances corroborates the hearsay.



(3) An affidavit for search substantially in the following form shall be deemed sufficient:

STATE OF INDIANA
COUNTY OF } ss.:

AB swears (or affirms, as the case may be) that he believes and has good cause to believe (here set forth the facts and information constituting the probable cause) that (here describe the things to be searched for and the offense in relation thereto) are concealed in or about the (here describe the house or place) of CD, situated in the county of in said state.

Subscribed and sworn to before me this day of 19 .

Indiana Code 35-33-5-8 states:

Sec. 8. (a) A judge may issue a search or arrest warrant without the affidavit required under section 2 of this chapter, if the judge receives sworn testimony of the same facts required for an affidavit:

(1) in a nonadversarial, recorded hearing before the judge;

(2) orally by telephone or radio; or

(3) in writing by facsimile transmission (FAX).

(b) After receiving the facts required for an affidavit and verifying the facts recited under penalty of perjury, an applicant for a warrant under subsection (a)(2) shall read to the judge from a warrant form on which the applicant enters the information read by the applicant to the judge. The judge may direct the applicant to modify the warrant. If the judge agrees to issue the warrant, the judge shall direct the

applicant to sign the judge's name to the warrant, adding the time of the issuance of the warrant.

(c) After transmitting an affidavit, an applicant for a warrant under subsection (a)(3) shall transmit to the judge a copy of a warrant form completed by the applicant. The judge may modify the transmitted warrant. If the judge agrees to issue the warrant, the judge shall transmit to the applicant a duplicate of the warrant. The judge shall then sign the warrant retained by the judge, adding the time of the issuance of the warrant.

(d) If a warrant is issued under subsection (a)(2), the judge shall record the conversation on audio tape and order the court reporter to type or transcribe the recording for entry in the record. The judge shall certify the audio tape, the transcription, and the warrant retained by the judge for entry in the record.

(e) If a warrant is issued under section (1)(3), the judge shall order the court reporter to the retype or copy the facsimile transmission for entry in the record. The judge shall certify the transcription or copy and warrant retained by the judge for entry in the record.

(f) The court reporter shall notify the applicant who received a warrant under subsection (a)(2) or (a)(3) when the transcription or copy required under this section is entered in the record. The applicant shall sign the typed, transcribed, or copied entry upon receiving notice from the court reporter. *As added by P.L.161-1990, SEC.2.*

(9)

No. 89-1715



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

CATHY BURNS
Petitioner,
vs.
RICK REED
Respondent.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF OF AMICI, THE STATES OF WYOMING, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON AND WISCONSIN

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No. 89-1715

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS**

The authorized law officers of Wyoming, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire,

New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin[1] submit this brief *amici curiae* in support of Respondent Rick Reed, urging affirmance of the decision of the Seventh Circuit Court of Appeals in the case of *Burns v. Reed*, 894 F.2d 949 (7th Cir. 1990). This brief is submitted pursuant to Rules 37.3, 37.5 and 37.6 of the Rules of the Supreme Court of the United States.

## INTEREST OF THE AMICI CURIAE

Attorneys General are the chief legal officers of their respective states.[2] Their duties include providing legal advice to state agencies and officials, representing the state in litigation, and advocating on behalf of the public in such areas as consumer protection and child support enforcement.[3]

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[1] In all of the states listed, except for Connecticut and the District of Columbia, the authorized law officer is the Attorney General, by and through whom these states appear. In Connecticut, the Chief State's Attorney exercises statewide prosecutorial authority, rather than the Attorney General. Therefore, it is that office which appears on behalf of Connecticut in cases such as this. Similarly, the Corporation Counsel serves as the chief legal officer of the District of Columbia, and appears on the District's behalf herein. Throughout this brief, the reference to Attorneys General should be read to include these authorized law officers as well.

[2] *State Attorneys General: Powers and Responsibilities* 12, 326, 337-338 (L. Ross, ed. 1990)[hereinafter cited as *State Attorneys General*].

[3] *State Attorneys General, supra* at 12-13; *see e.g.* Wyo. Stat. §§9-1-603(a), 9-1-606 (1977); Ala. Code 36-15-1(1), (3), (9), (13)-(15) and 36-15-12 (1975); Alaska Stat. §§44.23.020 (1989); Cal. Bus. and Prof. Code §320; D.C. Code §1-361 (1987 Replacement Vol.); Fla. Stat. §§16.01, 16.015 (1989); Idaho Code §§48-612, 67-1401; Ill. Rev. Stat. ch. 14, ¶4; ch. 121-122, ¶¶263-267; ch. 40, ¶1103 (1989); Iowa Code §13.1 *et seq.*; Mo. Rev. Stat. §27.060 (1986); N.H. Rev. Stat. Ann. §21-M:2 (1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §§42-9-3, 42-9-6, 9-31-6, 9-31-8; Tex. Gov't Code Ann. §§402.021, 402.042, 402.043 (Vernon 1990); Utah Code Ann. §67-5-1 (1988); Wis. Stat. §§165.105, 165.25.



Many Attorneys General have authority to initiate criminal prosecutions; some Attorneys General function as the principal prosecutor in their state, while others have authority to prosecute cases of state-wide jurisdiction, or cases involving state government officials, or to become involved in local cases in which the prosecutor has a conflict of interest.[4] Attorneys General are responsible for representing the state in criminal appeals to state and federal appellate courts.[5] As prosecutors, the Attorneys General have a direct interest in the outcome of this case, and its delineation of the scope of a prosecutor's immunity in preparing and presenting his case.

Attorneys General also provide legal advice to state agencies, officials and other clients. The duties of many of those clients involve the investigation of offenses ranging from violations of environmental laws to securities fraud. See, *e.g.* Cal. Gov't Code §§12600 *et seq.* and 15006; Idaho Code §67-2720; Minn. Stat. §45.027; Tex. Gov't Code Ann. §402.043 (Vernon 1990); Wis. Stat. §165.075. In addition, Attorneys General provide formal opinions on the law, including criminal law and procedure, which opinions are in turn relied upon by state officials and agencies, local

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[4] *State Attorneys General, supra* at 13, 38, 281-282; *State v. Jiminez*, 588 P.2d 707 (Utah 1978); Wyo. Stat. §§9-1-603(c), (d), 9-1-605(c), (d)(1977); Ala. Code §§36-15-13 through 36-15-16(1975); Alaska Stat. §44.23.020(b)(3)(1989); Cal. Gov't Code §§12550, 12553; D.C. Code §23-101(1989 Replacement Volume); Fla. Stat. §§16.01(4), (5), 16.52 (1989); Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.030(1986); N.H. Rev. Stat. Ann. §7:6(1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §42-9-2, 42-9-4; Tex. Gov't Code Ann. §§402.021 (Vernon 1990); Utah Code Ann. §67-5-1 (1988).

[5] *State Attorneys General, supra* at 13, 282-283; Wyo. Stat. §9-1-603(a)(ii)(1977); Ala. Code §36-15-1(3)(1975); Alaska Stat. §44.23.020(b)(1989); Cal. Gov't Code §12512; Fla. Stat. §§16.01(4), 16.52(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.050 (1986); N.H. Rev. Stat. Ann. §7:6(1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); Tex. Gov't Code Ann. §402.021 (Vernon 1990); Utah Code Ann. §67-5-1(1)(1988); Wis. Stat. §165.25(1).

prosecutors and law enforcement.[6] Attorneys General play a pivotal role in providing on-going legal information to prosecutors and law enforcement personnel.[7] The instant case directly presents the question of the scope of immunity when giving legal advice, the answer to which will directly affect the daily operation of the offices of Attorneys General throughout the country.

Finally, the Attorneys General are interested in this case because by serving as legal advisor to state civil rights agencies, initiating civil rights litigation, and promoting public education programs, they serve a critical role in safeguarding the civil rights of all citizens of their respective states.[8] Accordingly, their interest in this case is to ensure that the rights of all citizens are protected, and that the holding of *Imbler v. Pachtman*, 424 U.S. 490 (1976) is not contracted so as to unduly constrain the activities of the Attorneys General in providing the daily legal advice and prosecutorial functions that ensure the safety of all states' citizens.

## SUMMARY OF THE ARGUMENT

The United States Supreme Court has held that prosecutorial conduct "intimately associated with the judi-

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[6] *State Attorneys General, supra* at 61-74, 279-282; Wyo. Stat. §9-1-603(a)(vi)(1977); Ala. Code §36-15-1(1)(1975); Alaska Stat. §44.23.020(b)(4)(1989); Cal. Gov't Code §12519; Fla. Stat. §16.01(3), 16.08(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.040 (1986); N.H. Rev. Stat. Ann. §7:8 (1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §42-9-6; Tex. Gov't Code Ann. § 402.042 (Vernon 1990); Utah Code Ann. §67-5-1(6) (1988); Wis. Stat. §§165.015, 165.25(3).

[7] *State Attorneys General, supra* at 279-281; Wyo. Stat. §9-1-603(a)(v), (d)(1977); Ala. Code §36-15-15(1975); Cal. Gov't Code §12519; Fla. Stat. §§16.54, 16.56(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Mo. Rev. Stat. §27.040(1986); N.H. Rev. Stat. Ann. §7:6-a(1988); Pa. Stat. Ann., Tit. 71, §§732-101 through 732-506 (Purdon 1990 Supp.); R.I. Gen. Laws §42-28-20; Tex. Gov't Code Ann. §402.042 (Vernon 1990); Utah Code Ann. §67-5a-1(1990); Wis. Stat. §§165.50, 165.70, 165.75, 165.78.

[8] *State Attorneys General, supra* at 178-179, 254-260; see *e.g. Roberts v. United States Jaycees*, 468 U.S. 609 (1984).



cial phase of the criminal process" is entitled to absolute immunity. This immunity is based on three factors: the common-law precedent granting absolute immunity to prosecutors, the risks associated with exposing the prosecutor to liability, and the availability of alternate remedies to redress wrongful conduct.

These factors are applicable to the prosecutorial activities of rendering legal advice and appearing before a magistrate to obtain warrants. The decision whether to file charges, which has been held to be shielded from liability, requires the gathering and review of evidence. Inherent in this activity is providing advice to the police officers who obtain information concerning a crime. Similarly, ensuring the accused's presence is critical to the state's case, and hence is part of the judicial process, entitled to absolute immunity.

Strong public policy reasons support immunizing such conduct from liability. Citizens benefit when police officers are encouraged to seek advice from prosecutors before taking action against putative defendants, and prosecutors must be able to exercise independent judgment in providing such advice. Prosecutors must often act quickly in the aftermath of a crime, and their ability and willingness to do so must not be constrained by fear of endless litigation resulting from their informed decisions.

## ARGUMENT I

### RENDERING LEGAL ADVICE AND APPEARING BEFORE A MAGISTRATE TO OBTAIN WARRANTS IS CONDUCT "INTIMATELY ASSOCITED WITH THE JUDICIAL PHASE OF THE CRIMINAL PROCESS" AND HENCE ENTITLED TO ABSOLUTE IMMUNITY.

In *Imbler v. Pachtman*, the Court established a functional analysis test to determine if challenged activities were "an integral part of the judicial process," "intimately associated with the judicial phase of the criminal process,"

and hence entitled to the shield of absolute immunity. *Id.*, 424 U.S. at 430.

In holding that such conduct was shielded from liability, the Court noted substantial public policy reasons supporting the grant of absolute immunity: unwarranted impact on the prosecutor's role by redirecting his energies to the defense of civil suits and affecting the independent exercise of his judgment in pursuing cases; and weakening of the criminal justice system itself. *Id.*, 424 U.S. at 422-427.

The focus on the judicial nature of the challenged activities, and application of the functional analysis test, were reiterated in later cases. *Butz v. Economou*, 438 U.S. 478 (1978). In *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983), this Court commented that "immunity rests on functional categories, not on the status of the defendant."

The Court has set forth three factors to be considered in determining the applicability of absolute immunity to a particular function: (1) the existence of an historical or common-law basis for immunity; (2) whether performance of the duty poses obvious risks of subsequent litigation against the official; and (3) whether there exist alternate means of redressing wrongful conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 521-523 (1985); see also *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), citing *Butz v. Economou*, 438 U.S. at 512. Challenged conduct must be reviewed in light of these factors and the public policy considerations articulated in *Imbler*, in determining whether absolute immunity is applicable.

A. *Rendering legal advice is a necessary duty of a prosecutor, beginning well before the actual filing of criminal charges. Subjecting a prosecutor to liability for his conduct in giving legal advice would inhibit his ability to prosecute criminal conduct and protect the public.*

The giving of legal advice, particularly to members of the law enforcement community, is intimately associated



with the judicial phase of criminal proceedings, and hence conduct entitled to absolute immunity. Many courts have underscored the judicial nature of the advisor role, and have found the shield of absolute immunity appropriate. *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d at 671; *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988).

The role of legal advisor begins well before the actual filing of criminal charges. *Imbler v. Pachtman*, 424 U.S. at 431, n. 33.[9] Activities inherent in this role include deciding whether to proceed with formal charges and obtaining the necessary search and arrest warrants, conduct which has been held entitled to absolute immunity. *Ehrlich v. Giuliani*, ___ F.2d ___ (4th Cir. 1990), as available at 1990 WESTLAW 112356; *Joseph v. Patterson*, 795 F.2d 549, 555-556 (6th Cir. 1986), *cert. denied* 481 U.S. 1023; *Henderson v. Lopez, supra*; *Hamilton v. Daley*, 777 F.2d 1207, 1213 (7th Cir. 1985); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983); *Marx v. Gumbinner*, 855 F.2d at 790.

In ascertaining whether specific conduct is of a "quasi-judicial" nature, and thus immune, courts have focused on the advocatory nature of the challenged activity. As the Sixth Circuit Court of Appeals noted in *Joseph v. Patterson*, 795 F.2d at 554, "[T]he critical inquiry is how closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the judicial phase

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[9] See also *Baez v. Hennessy*, 853 F.2d 73, 75 (2d Cir. 1988), *cert. denied* ___ *U.S.* ___, 109 S.Ct. 805 (1989) (misreading a grand jury voting sheet and preparing an erroneous indictment were activities "within the course of [the prosecutor's] official duties in the preparation and presentment of the indictment and thus absolutely immune"); *Barrett v. United States*, 798 F.2d 565, 571-572 (2nd Cir. 1986) (absolute immunity encompasses activities associated with potential litigation, such as initiating a prosecution or deciding against doing so); *Myers v. Morris*, 810 F.2d 1437, 1445-1446 (8th Cir. 1987), *cert. denied* ___ U.S. ___, 108 S.Ct. 97 (decision to file charges shielded by absolute immunity).

of the criminal process." A prosecutor's duty as an advocate intimately involved in the judicial phase of criminal proceedings begins almost as soon as the crime has occurred; evidence must be reviewed, facts marshalled, and a decision made whether to even proceed with the filing of charges. This decision sometimes cannot be made without appropriate development of the facts, which may require investigation. To expose prosecutors to liability for investigating whether charges should be filed would foster uninformed decisionmaking, *Lee v. Willins*, 617 F.2d 320, 322 (2nd Cir. 1980), and also mean liability for the failure to investigate, a claim that could be made in almost every case which proceeds to court, for every defendant could argue that if only the prosecutor had investigated more fully, no charges would have been filed.[10] Given the constraints of time, information and other resources with which prosecutors must contend, *Imbler v. Pachtman*, 424 U.S. at 425-426, such exposure to liability would cripple the criminal justice system, and cannot be countenanced.

The prosecutor's duty to seek justice, and to treat with impartiality all those involved at this most initial phase of the criminal proceedings, is recognized in both the American Bar Association Code of Professional Responsibility, Ethical Consideration 7-13(b), Disciplinary Rule 7-103, and in caselaw. *Palmer v. State*, 288 N.E.2d 739, 755 (Ind. App. 1974). Prior to the actual filing of charges is perhaps the time in the criminal proceedings when the prosecutor exercises the greatest discretion, and when the threat of litigation would most chill his ability to properly perform his role. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). Thus, the shield of absolute immunity must not be handed to a prosecutor only when he enters the courthouse door, but must be available to him as he initiates a prosecution.

[10] In *Martinez v. Winner*, 771 F.2d 424, 437 (10th Cir. 1985), the court noted that a failure to make an independent investigation is entitled to absolute immunity.



While in *Imbler* the Court explicitly reserved the question of whether absolute immunity also extended to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than an advocate," *id.* at 430-431, that reservation did not preclude the application of absolute immunity to either the rendering of legal advice or to conduct preceeding the actual filing of criminal charges, such as the obtaining of search and arrest warrants. The reserved question in *Imbler* should be answered by articulating that advocatory activities preceeding the formal filing of charges are "intimately associated with the judicial phase of criminal proceedings" and hence entitled to absolute immunity.

B. *The common-law immunity afforded to prosecutors in performing their various duties, including rendering legal advice and obtaining warrants, justifies affording absolute immunity to such conduct under 42 U.S.C. §1983.*

Under *Mitchell v. Forsyth*, 472 U.S. at 521, 523, one of the three factors to be considered in determining the applicability of absolute immunity to a particular function is the existence of an historical or common-law basis for immunity. Thus, the initial inquiry for the Court "is whether an official claiming immunity under §1983 can point to a common-law counterpart to the privilege he asserts." *Malley v. Briggs*, 475 U.S. at 339-340, citing *Tower v. Glover*, 467 U.S. 914 (1984); see also *Imbler v. Pachtman*, 424 U.S. at 422, n. 20.

The office and duties of Attorneys General have roots in the common law. The first Attorney General in England was appointed in the mid-thirteenth century, and had the authority to prosecute serious criminal cases and conduct special investigations.[11] The role and duties of the Attorney General developed over the succeeding centuries, and were brought to the New World, where the first colonial

[11] *State Attorneys General, supra* at 3-4.

Attorney General was appointed in 1643.[12] Seven delegates to the Constitutional Convention either had served or would serve as the Attorney General of their colony or state.[13] Eventually, all states created the office of Attorney General, either in the state constitution or by statute.[14]

A summary of the common law powers of a state Attorney General was set forth in *State v. Warren*, 180 So.2d 293, 299 (Miss. 1965):

> At common law the duties of the attorney general, as chief law officer of the realm, were numerous and varied. He was chief legal adviser to the crown, was entrusted with management of all legal affairs, and prosecution of all suits, civil and criminal, in which the crown was interested. He had authority to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state, and to intervene in all actions which were of concern to the general public.[15]

The variety of duties required of Attorneys General has spawned a number of suits. In most cases, courts have found those activities which were prosecutorial in nature to be entitled to absolute immunity. *Mother Goose Nursery Schools, Inc. v. Sendak, supra; Henderson v. Lopez, supra; Marx v. Gumbinner, supra.* As noted by the Seventh Circuit, "the dispositive question is whether the conduct of the prosecutor is of a judicial nature and requires the prosecutor to exercise analogous judgment." *Burns v. Reed*, 894 F.2d at 955. This question relates back to the

[12] *Id.* at 5-6.
[13] *Id.* at vii.
[14] *Id.* at 8-9, 337-338.
[15] This case summarized the frequently-cited list from the case of *People v. Miner*, 2 Lans (NY) 396 (1868). See also *State Attorneys General, supra* at 35-39; *State v. Jiminez*, 588 P.2d 707 (Utah 1978); *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976).



common law foundation of the immunity granted to judges: if the prosecutor's conduct is sufficiently related to judicial conduct, the same historical basis exists for the grant of absolute immunity. *Imbler* was but one of a series of cases in which the Court recognized "the common-law precedents extending absolute immunity to parties participating in the judicial process: judges, grand jurors, petit jurors, advocates, and witnesses." *Butz v. Economou*, 438 U.S. at 509; see also *Yaselli v. Goff*, 275 U.S. 503 (1927). The conduct of a prosecutor in locating evidence and securing the presence of the accused is as related to the judicial process as is the decision to file charges, and thus is entitled to absolute immunity. *Ehrlich v. Giuliani, supra.*

C. *Adequate alternate remedies exist to curtail inappropriate conduct in rendering legal advice or obtaining warrants.*

One of the reasons absolute immunity was afforded to prosecutorial conduct in *Imbler v. Pachtman*, 424 U.S. at 427-428, was that adequate alternate means existed by which to curtail inappropriate activities. The filing of criminal charges for willful deprivations of constitutional rights was noted. *Id.* The Court also emphasized that prosecutors are unique in that they are also subject to professional discipline, which discipline can result in loss of the privilege to practice law. *Id.* at 429; see also *Malley v. Briggs*, 475 U.S. at 343, n.5.

These avenues of relief are equally available in the instant case. In addition, in cases which might involve suits against the Attorneys General or their staff in their role as prosecutors, it should be noted that Attorneys General are answerable either to the electorate, or in those states with appointed Attorneys General, to the appointing authority.[16] Attorneys General may also be removed from office

[16] *State Attorneys General, supra* at 15-23; Wyo. Stat. §9-1-601(a)(1977); Alaska Const. art. III, §25; Cal. Const. art. V, §11; Idaho Code §34-612; Ill. Const. 1970, art. V, §1; Mo. Rev. Stat. §27.010 (1986); N.H. Rev. Stat.

by impeachment, recall, or removal by the appropriate appointing authority.[17] These remedies, as well as those such as an injunction halting further prosecutorial action, or the filing of criminal proceedings under 18 U.S.C. §242, ensure that shielding prosecutorial conduct from liability under 42 U.S.C. §1983 will not allow misconduct to flourish.

It should be noted that prosecutors have been afforded immunity from damages not only because alternate remedies exist, but also because damages are an inappropriate device for curbing prosecutorial abuse. Many victims of prosecutorial bad faith would be unable to recover because they are incarcerated, unable to discover the bad faith, or otherwise unable to bring suit. Moreover, since recovery would depend on prosecutorial motive, not the extent of the victim's injury, any compensation might be unrelated to the amount of compensation to which the victim is truly entitled.

The inappropriateness of damages relates back to the public policy reasons supporting the grant of absolute immunity to prosecutors for conduct "intimately associated with the judicial phase of the criminal process." This Court has articulated the need to protect the criminal justice system itself, and preserve the prosecutor's independent exercise of judgment in pursuing cases. *Imbler v. Pachtman*, 424 U.S. at 422-427. Other public policy reasons include the concern that "potential liability could deter prosecutors from revealing errors and from responding quickly once they become aware of a problem," *Ehrlich v.*

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Ann. §7:8, 7:9(1988); Pa. Const. Ann., art. IV, §4.1(Purdon 1990 Supp.); Utah Const. art. VII, §1.

[17] *State Attorneys General, supra* at 24-25; Wyo. Stat. §§9-1-601(a), 9-1-202(a)(1977); Ala. Const. of 1901 art. VI, §173; Alaska Const. art. III, §25; Cal. Const. art. IV, §18; Idaho Code §34-1701 *et seq.*; Ill. Const. 1970, art. IV, §14; Mo. Const. art. VII, §1; N.H. Const., pt. 2, art. 38; Pa. Const. Ann., art. VI, §6 (Purdon 1969); Utah Const. art. VI, §19; Wis. Stat. §17.06.



*Giuliani, supra*, the concept that officials owe a duty to the public rather than to specific individuals, and the fear that exposure to unwarranted liability would deter individuals from seeking public positions. *Robichaud v. Ronan*, 351 F.2d 533, 535 (9th Cir. 1965).

The conduct of a prosecutor in rendering legal advice prior to the filing of charges, or in obtaining search and arrest warrants, is sufficiently related to the judicial phase of the criminal process to require absolute immunity. As in *Malley v. Briggs*, 475 U.S. at 342, the acts are shielded from liability "not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself."

## ARGUMENT II

### REMOVING THE GIVING OF LEGAL ADVICE, AND THE OBTAINING OF WARRANTS, FROM THE RANGE OF PROTECTED CONDUCT WILL GREATLY HINDER THE WORKINGS OF PROSECUTORS AND ATTORNEYS GENERAL.

The scope of activities in which Attorneys General engage was described above. If the ruling in *Imbler* were contracted so that the giving of legal advice was not afforded the shield of absolute immunity, the consequences would be detrimental to the functioning of Attorneys General and their staff. Attorneys General would be constrained from offering advice to prosecutors, state officials and agencies for fear that litigation would result every time an attorney spoke with a client.

Attorneys General are required in most states to provide formal opinions on the law.[18] Such opinions may be

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[18] *State Attorneys General, supra* at 61-65; Wyo. Stat. 9-1-603(a)(vi) (1977); Ala. Code §§36-15-1(1) and 36-15-15(1975); Alaska Stat. §44.23.020 (b)(4) (1989); Cal. Gov't Code §12519; Fla. Stat. §§16.01(3), 16.08(1989); Idaho Code §67-1401; Ill. Rev. Stat. ch. 14, ¶4(1989); Minn. Stat. §§8.05 through 8.07; Mo. Rev. Stat. §27.040(1986); N.H. Rev. Stat. Ann. §§7:7,

rendered to local prosecutors. See, *e.g.* Wyo. Stat. §9-1-603(a)(v), (vi)(1977); Cal. Gov't Code §12519; Ill. Rev. Stat. ch. 14, ¶4(1989); Minn. Stat. §8.07; Wis. Stat. §165.25(3). In addition, many Attorneys General are involved in preparing and presenting educational information to law enforcement and state peace officer standards and training commissions.[19] If the giving of legal advice subjects the attorney to liability, such activities may well cease, which is contrary to one reason absolute immunity was extended to prosecutorial conduct in the first place: preservation of the functioning of the criminal justice system. *Imbler v. Pachtman*, 424 U.S. at 426. As the Seventh Circuit Court of Appeals noted in *Burns v. Reed*, 894 F.2d at 955-956:

> [P]olice officers do turn to a prosecutor when they are uncertain about the legality of a possible investigative technique. And this is as it should be. We do not hesitate to recognize that the decision at hand should be guided, in part, by sound policy considerations. With that in mind, it is entirely likely that if prosecutors were granted only qualified immunity from suits for conduct relating to their role as the officers' legal advisor, the end result would be to discourage prosecutors from fulfulling this vital obligation. Police officers, in turn, would be left to take their best guess as to what a suspect's rights are. On balance, one of the central goals of the criminal justice system would be dramatically undercut. Police officers will be less well-informed about both their ability to employ certain investigative techniques, and the possibility that their proposed conduct will violate the rights of their suspects.

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7:8, 21-M:2(1988); Pa. Stat. Ann., Tit. 71, §§ 732-101 through 7-32-506 (Purdon 1990 Supp.); R.I. Gen. Laws §§42-9-6, 42-28-20; Utah Code Ann. §67-5-1(6)(1988); Wis. Stat. §165.015.

[19] *State Attorneys General, supra* at 279-282; see *e.g.* Mo. Rev. Stat. §27.040(1986).



The Court noted in *Imbler* that the danger in exposing a prosecutor to liability is not from the outcome of the litigation itself, for indeed many lawsuits would not be successful, but from the expenditure of resources in defending against such suits. *Imbler*, 424 U.S. at 419 n. 13; *Burns v. Reed*, 894 F.2d at 954, n. 3; *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The attention and resources of the Attorneys General would be redirected from providing the best legal advice possible and ensuring that the rights of all citizens are protected, to defending against potential litigation. *Burns v. Reed*, 894 F.2d at 955-956.

Taking the path urged by Petitioners (brief at 31) would encourage, if not in fact mandate, that prosecutors exercise no independent judgment prior to the actual filing of charges, although the exercise of that independent judgment frequently results in no charges being filed and therefore, protects all citizens from indiscriminate prosecution. *Marx v. Gumbinner*, 855 F.2d at 790. Limiting the protection of absolute immunity to the filing of charges and subsequent activities would both diminish the amount of much-needed legal advice that prosecutors and Attorneys General render and increase the number of charges actually filed, leaving the judicial system to sort out the cases in which charges should not have been filed, and expanding the risks of citizens being exposed to illegal police tactics. This would not only burden our legal system but would also have a negative impact on all citizens of this country, who could no longer count on prosecutors to prevent frivolous prosecutions.

This case presents the Court with an opportunity to articulate a bright-line rule, abandoning the case-by-case approach which undercuts the very reasons supporting absolute immunity. The rationale underlying absolute immunity is to defeat a suit at the outset, "avoid[ing] the personal, institutional and social cost associated with such suits." *Burns v. Reed*, 894 F.2d at 954, n. 3, quoting *Harlow v. Fitzgerald*, 457 U.S. at 814. The functional analysis test,

however, has required a case-by-case review of whether the questioned conduct falls on the investigatory or prosecutorial side of the immunity line, during which review many cases proceed through the court system, see *e.g. Marx v. Gumbinner*, 855 F.2d at 789, n. 10., subjecting the prosecutor to suit and incurring the very costs sought to be avoided. In order to encourage the prosecutor's exercise of independent judgment, and to preserve his discretion in pursuing cases, the line of absolute immunity must be drawn to include the activities of Respondent in this case.

## CONCLUSION

For the reasons stated above, amici urge affirmance of the decision of the Seventh Circuit Court of Appeals in the case of *Burns v. Reed*, 894 F.2d 949 (7th Cir. 1990).

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